Form No. 7

San Francisco Law Library

No. 77082

Presented by

.....

EXTRACT FROM BY-LAWS

Section 9. No book shall, at any time, be taken from the Library Room to any other place than to some court room of a Court of Record, State or Federal, in the City of San Francisco, or to the Chambers of a Judge of such Court of Record, and then only upon the accountable receipt of some person entitled to the use of the Library. Every such book so taken from the Library, shall be returned on the same day, and in default of such return the party taking the same shall be suspended from all use and privileges of the Library until the return of the book or full compensation is made therefor to the satisfaction of the Trustees.

Sec. 11. No books shall have the leaves folded down. or be marked, dog-eared, or otherwise soiled, defaced or injured. Any party violating this provision, shall be liable to pay a sum not exceeding the value of the book, or to replace the volume by a new one, at the discretion of the Trustees or Executive Committee, and shall be liable to be suspended from all use of the Library till any order of the Trustees or Executive Committee in the premises shall be fully complied with to the satisfaction of such Trustees or Executive Committee.

WILCOX & CO.

No. 4037

1352

United States Circuit Court of Appeals

For the Ninth Circuit.

TOM PAPPAS, CHARLES H. FERGUSON and OLIVER THOMPSON,

Plaintiffs in Error.

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court of the Western District of Washington, Northern Division.

FILED
MAY 29 1923
F. D. MONCKTON,
CLERK

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

No. 4037

United States

Circuit Court of Appeals

For the Ninth Circuit.

TOM PAPPAS, CHARLES H. FERGUSON and OLIVER THOMPSON,

Plaintiffs in Error.

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court of the Western District of Washington, Northern Division.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.


Digitized by the Internet Archive
in 2010 with funding from
Public.Resource.Org and Law.Gov

http://www.archive.org/details/govuscourtsca9briefs1352

INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

Page

Arraignment and Plea (Charles H. Ferguson and Oliver Thompson) 6
Arraignment and Plea (Tom Pappas) 6
Assignments of Error (C. Ferguson) 31
Assignments of Error (O. Thompson) 33
Assignments of Error (Tom Pappas) 28
Bill of Exceptions of Charles L. Ferguson and Oliver Thompson 54
Bond on Appeal (Charles Ferguson) 44
Bond on Appeal (Oliver Thompson) 47
Bond on Writ of Error (Tom Pappas) 40
Certificate of Clerk U. S. District Court to Transcript of Record 126
Citation on Writ of Error (Charles H. Ferguson) 133
Citation on Writ of Error (Tom Pappas) 132
Citation on Writ of Error (Oliver Thompson) 135
Court's Instructions to Jury 107
Hearing on Motions for New Trial and in Arrest of Judgment and Order Denying Same 17
Information 1

Index. Page

Motion for New Trial (Charles H. Ferguson) 14
Motion for New Trial (Oliver Thompson).... 15
Motion for New Trial (Tom Pappas)..... 13
Motion in Arrest of Judgment (Charles H. Ferguson) 12
Motion in Arrest of Judgment (Oliver Thompson) 11
Names and Addresses of Counsel..... 1
Order Allowing Writ of Error (C. Ferguson) 37
Order Allowing Writ of Error (Tom Pappas) 36
Order Allowing Writ of Error (O. Thompson) 39
Order Extending Time to and Including February 15, 1922, to File Record and Docket Cause 50
Order Extending Time to and Including February 28, 1923, to File Record and Docket Cause 51
Order Extending Time to and Including April 1, 1923, to File Record and Docket Cause.. 53
Order Extending Time to and Including April 16, 1923, to File Record and Docket Cause. 123
Order Settling Bill of Exceptions 121
Petition for Writ of Error (C. Ferguson).... 23
Petition for Writ of Error (O. Thompson)... 25
Petition for Writ of Error (Tom Pappas).... 20
Praecipe for Transcript of Record..... 124
Sentence (Charles Ferguson) 18
Sentence (Tom Pappas) 17
Sentence (Oliver Thompson)..... 19

Index. Page

TESTIMONY ON BEHALF OF THE GOVERNMENT:

ANDERSON, MAX 63
Cross-examination by Mr. Brown.... 65
Cross-examination by Mr. Chavelle... 65
Redirect Examination 65
JUSTI, WALTER M..... 60
Cross-examination by Mr. Brown.... 62
Cross-examination by Mr. Chavelle... 62
Recross-examination 62
KLINE, T. W..... 76
MOORING, H. V..... 54
Cross-examination by Mr. Brown.... 58
Cross-examination by Mr. Chavelle... 58
Cross-examination by Mr. Brown.... 59
MOORING, MAUDE 59
Cross-examination by Mr. Brown.... 60
Cross-examination by Mr. Chavelle... 60
REAGAN, L..... 74
Cross-examination 75
WHITNEY, W. M..... 66
Cross-examination 71
Redirect Examination 72
Recross-examination 73
Cross-examination 74

TESTIMONY ON BEHALF OF DEFENDANTS:

FERGUSON, CHARLES L..... 97
Cross-examination by Mr. Brown.... 101
Cross-examination by Mr. Allen..... 102
Redirect Examination 104

Index.

Page

TESTIMONY ON BEHALF OF DEFENDANTS—Continued:

HILL, J. C. 76
Cross-examination 80
Redirect Examination 80
Cross-examination 80
PAPPAS, TOM 85
Cross-examination by Mr. Chavelle.. 94
Cross-examination by Mr. Allen..... 95
Redirect Examination 96
Direct Examination 97
RAMAGE, EARLE 81
Cross-examination by Mr. Chavelle.. 83
Cross-examination by Mr. Allen..... 83
THOMPSON, OLIVER 105
Cross-examination 106
Redirect Examination 106
Recross-examination 106
Trial 7
Trial Resumed 8
Verdict 10
Writ of Error (Tom Pappas)..... 128
Writ of Error (O. Thompson and C. Ferguson) 130

Names and Addresses of Counsel.

FRED C. BROWN, Esq., Attorney for Plaintiff in Error Tom Pappas,
201 Lyon Building, Seattle, Washington.

EDWARD H. CHAVELLE, Esq., Attorney for Plaintiffs in Error Charles H. Ferguson and Oliver Thompson,
315 Lyon Building, Seattle, Washington.

THOMAS P. REVELLE, Esq., United States Attorney, Attorney for Defendant in Error,
310 Federal Building, Seattle, Wash.

DE WOLFE EMORY, Esq., Assistant United States Attorney, Attorney for Defendant in Error,
310 Federal Building, Seattle, Washington.

[1*]

United States District Court, Western District of Washington, Northern Division.

No. 7069.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

TOM PAPPAS, C. FERGUSON and O. THOMPSON,
Defendants.

Information.

BE IT REMEMBERED, that Thomas P.

*Page-number appearing at foot of page of original certified Transcript of Record.

Revelle, Attorney of the United States of America, for the Western District of Washington, who, for the said United States in this behalf prosecutes in his own person, comes here into the District Court of the said United States for the district aforesaid, on the 29th day of September, in this same term, and for the said United States gives the Court here to understand and be informed that, as appears from the affidavit of H. V. Mooring, made under oath herein filed:

COUNT I.

That on the thirtieth day of June, in the year of our Lord one thousand nine hundred and twenty-two, at the City of Seattle, in the Northern Division of the Western District of Washington, and within the jurisdiction of this court, Tom Pappas, C. Ferguson and O. Thompson, whose true Christian names are to the United States Attorney unknown, then and there being, did then and there knowingly, wilfully and unlawfully have and possess certain intoxicating liquor, to wit, forty-six (46) bottles each containing one-fifth of a gallon of a certain liquor known as whiskey and one hundred and twenty (120) pints of a certain liquor known as beer, then and there containing [2] more than one-half of one per centum of alcohol by volume and fit for use for beverage purposes, a more particular description of the amount and kind thereof being to the United States Attorney unknown, intended then and there by the said Tom Pappas, C. Ferguson and O. Thompson, for use in violating the Act of Congress passed October 28,

1919, known as the National Prohibition Act, by selling, bartering, exchanging, giving away and furnishing said intoxicating liquors, and which possession of said liquors by the said Tom Pappas, C. Ferguson and O. Thompson, as aforesaid, was then and there unlawful and prohibited by the Act of Congress passed October 28, 1919, known as the National Prohibition Act; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

COUNT II.

And the said United States Attorney further informs the Court that on the thirtieth day of June, in the year of our Lord one thousand nine hundred and twenty-two, at the City of Seattle, in the Northern Division of the Western District of Washington, and within the jurisdiction of this court, Tom Pappas, C. Ferguson and O. Thompson, whose true Christian names are to the United States Attorney unknown, then and there being, did then and there knowingly, wilfully and unlawfully transport in a certain vehicle then and there in charge of the said Tom Pappas, C. Ferguson and O. Thompson, to wit, a certain automobile known as a Studebaker automobile, Washington license 122240, Engine No. BG56587, certain intoxicating liquor, to wit, forty-six (46) Bottles each containing one-fifth of a gallon of a certain liquor known as whiskey and one hundred and twenty (120) pints of a certain liquor known as beer, then and [3] there containing more than

one-half of one per centum of alcohol by volume and fit for use for beverage purposes, a more particular description of the kind and quantity thereof being to the United States Attorney unknown, and which transporting of said liquor by the said Tom Pappas, C. Ferguson and O. Thompson, as aforesaid, was then and there unlawful and prohibited by the Act of Congress passed October 28, 1919, known as the National Prohibition Act; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

COUNT III.

And the said United States Attorney further informs the court that on the thirtieth day of June, in the year of our Lord one thousand nine hundred and twenty-two, at the City of Seattle, in the Northern Division of the Western District of Washington, and within the jurisdiction of this court, Tom Pappas, C. Ferguson and O. Thompson, whose true Christian names are to the United States Attorney unknown, then and there being, did then and there knowingly, wilfully and unlawfully sell certain intoxicating liquor, to wit, twenty-four (24) bottles each containing one-fifth (1/5) of a gallon of a certain liquor known as whiskey, then and there containing more than one-half of one per centum of alcohol by volume and fit for use for beverage purposes, a more particular description of the amount and kind of said liquor being to the United States Attorney unknown, and which sale of said liquor by the said Tom Pappas, C. Ferguson

and O. Thompson, as aforesaid, was then and there unlawful and prohibited by the Act of Congress passed October 28, 1919, known as the National Prohibition Act; contrary to the form of the statute in such case made and provided, and against the peace [4] and dignity of the United States of America.

THOS. P. REVELLE,
United States Attorney.
CHAS. E. ALLEN,
Assistant United States Attorney.

Let warrant issue:
Bail fixed $750.

NETERER,
Judge.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Sep. 29, 1922. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [5]

United States District Court, Western District of Washington, Northern Division.

No. 7069.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

TOM PAPPAS,
Defendant.

Arraignment and Plea.

Now, on this 23d day of October, 1922, the above defendant comes into open court for arraignment accompanied by his attorney F. C. Reagan, and says that his true name is Tom Pappas. Whereupon the reading of the information is waived and he here and now enters his plea of not guilty.

Journal #10, page 327. [6]

United States of America, Western District of Washington, Northern Division.

No. 7069.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

C. FERGUSON and O. THOMPSON,

Defendant.

Arraignment and Plea.

Now, on this 30th day of October, 1922, the above defendants come into open court for arraignment accompanied by their attorney C. L. Reames and say that their true names are Charles H. Ferguson and Oliver Thompson. Whereupon each defendant here and now enters his plea of not guilty.

Journal #10, page 348. [7]

United States of America, Western District of Washington, Northern Division.

No. 7069.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

TOM PAPPAS, CHARLES L. FERGUSON and OLIVER THOMPSON,

Defendants.

Trial.

Now, on this 20th day of December, 1922, this cause comes on for trial with C. E. Allen present in behalf of the Government, Fred C. Brown for defendant Pappas, and E. H. Chavelle for defendants Ferguson and Thompson. Whereupon all parties being present a jury is empanelled and sworn as follows: Emmet S. Palmer, F. S. Backus, Robert Patrick, J. H. Gordon, W. H. Ettridge, Paul Wangsmo, William H. Patterson, Jens Anderson, F. A. Beeler, Grank G. Mann, Willis Markham, and Samuel J. Rice. Upon motion of E. H. Chavelle, all witnesses were excluded from the courtroom except when testifying. Opening statements are made to the jury for both sides. Government witnesses are sworn and examined as follows: Harold V. Mooring, Maude Mooring, Walter M. Justi, Max Anderson and W. M. Whitney. Government Exhibits Numbered 1, 2, 3, 4, 5 and 6 are introduced as evidence.

Journal #10, page 431. [8]

United States of America, Western District of Washington, Northern Division.

No. 7069.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

TOM PAPPAS, CHARLES L. FERGUSON and OLIVER THOMPSON,

Defendants.

Trial Resumed.

Now, on this 21st day of December, 1922, all parties being present, trial in this cause is resumed. Government witnesses are sworn and examined as follows: W. M. Whitney (recalled), Leonard Regan, and C. W. Kline. Government Exhibits Numbered 7 and 8 are introduced as evidence. Government rests. Fred C. Brown, attorney for defendant Pappas moves for directed verdict as to said defendant Tom Pappas. Said motion is denied and exception is allowed. E. H. Chavelle, attorney for defendants Ferguson and Thompson moves for a directed verdict as to said defendants Ferguson and Thompson. Said motion is denied and exception allowed. Defendant's witnesses are sworn and examined as follows: J. C. Hill, Earle Ramage, and Tom Pappas. Defendant Pappas rests. Defendant's witnesses are sworn and examined as follows: Charles L. Ferguson and Oliver Thompson. Defendants Ferguson and Thompson rest.

Motion is made by defendant Pappas for a directed verdict. Said motion is denied and exception allowed. Motion is made by defendants Ferguson and Thompson for a directed verdict. Said motion is denied and exception allowed. Cause is now argued to the jury by both sides. Jury after being instructed by the Court, retired for deliberation. Jury again came into open court at 4:30 P. M. All defendants being present and likewise all attorneys, roll-call of jury is waived. A verdict of guilty on all counts is returned and reads as follows: "We, the jury in the above-entitled cause, find the defendant Tom Pappas is guilty as charged in Count I of the information herein; and further find the defendant Charles L. Ferguson is guilty [9] as charged in Count I of the information herein; and further find the *the* defendant Oliver Thompson is guilty as charged in Count I of the information herein; and further find the defendant Tom Pappas is guilty as charged in Count II of the information herein; and further find the defendant Charles L. Ferguson is guilty as charged in Count II of the information herein; and further find the defendant Oliver Thompson is guilty as charged in Count II of the information herein; and further find the defendant Tom Pappas is guilty as charged in Count III of the information herein; and further find the defendant Charles L. Ferguson is guilty as charged in Count III of the information herein and further find the defendant Oliver Thompson is guilty as charged in Count III of the information herein, Ernest G. Palmer, foreman. Verdict is ordered filed and sentence is set for

December 26, 1922. Defendants are allowed to go on present bail. [10]

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 7069.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

TOM PAPPAS, CHARLES L. FERGUSON and OLIVER THOMPSON,

Defendants.

Verdict.

We, the jury in the above-entitled cause, find the defendant Tom Pappas is guilty, as charged in Count I of the information herein; and further find the defendant Charles L. Ferguson is guilty, as charged in Count I of the information herein; and further find the defendant Oliver Thompson is guilty as charged in Count I of the information herein; and further find the defendant Tom Pappas is guilty, as charged in Count II of the information herein; and further find the defendant Charles L. Ferguson is guilty, as charged in Count II of the information herein; and further find the defendant Oliver Thompson is guilty, as charged in Count II of the information herein; and further find the defendant Tom Pappas is guilty, as charged in Count III of the information

herein; and further find the defendant Charles L. Ferguson is guilty, as charged in Count III of the information herein; and further find the defendant Oliver Thompson is guilty, as charged in Count III of the information herein.

EMMET S. PALMER,
Foreman.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Dec. 21, 1922. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [11]

In the District Court of the United States for the Western District of Washington, Northern Division.

IN ADMIRALTY—No. 7069.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

TOM PAPPAS, OLIVER THOMPSON, and CHARLES H. FERGUSON,
Defendants.

Motion in Arrest of Judgment.

Comes now Oliver Thompson, one of the defendants in the above-entitled cause, and moves the Court to arrest judgment and sentence herein, upon the ground and for the reason, among others:

That Counts I, II and III, of the indictment

herein had no force or effect, in the above-entitled cause, and are contrary to the law.

EDWARD H. CHAVELLE,
Attorney for Defendant Oliver Thompson.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Dec. 26, 1922. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [12]

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 7069.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

TOM PAPPAS, OLIVER THOMPSON, and CHARLES H. FERGUSON,
Defendants.

Motion in Arrest of Judgment.

Comes now Charles H. Ferguson, one of the defendants in the above-entitled cause, and moves the Court to arrest judgment and sentence herein, upon the ground and for the reason, among others:

That Counts I, II and III of the indictment herein had no force or effect in the above-entitled cause, and are contrary to the law.

EDWARD H. CHAVELLE,
Attorney for Defendant Charles H. Ferguson.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Dec. 26, 1922. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [13]

In the District Court of the United States for the Western District of Washington, Northern Division.

IN ADMIRALTY—No. 7069.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

TOM PAPPAS et al.,

Defendants.

Motion for New Trial.

Comes now the defendant, Tom Pappas, and moves the Court to set aside the verdict of the jury heretofore entered herein, and grant a new trial, on the following grounds:

1. Insufficiency of the evidence to justify verdict.

2. Said verdict was against, and contrary to the evidence.

3. Said verdict was against, and contrary to law.

4. Errors of law occurring during the trial, and excepted to by the attorney for the defendant.

FRED C. BROWN,

Attorney for Defendant Tom Pappas,

Received copy Jan. 2, 1923.

THOS. P. REVELLE,
Atty. for Pltf.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Jan. 2, 1923. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [14]

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 7069.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

TOM PAPPAS, OLIVER THOMPSON and CHARLES H. FERGUSON,
Defendants.

Motion for New Trial.

Now comes the defendant Charles H. Ferguson, and moves the Court to set aside the verdict of the jury heretofore entered herein, and grant a new trial, on the following grounds:

1. Insufficiency of the evidence to justify the verdict.

2. Said verdict was against, and contrary to the evidence.

3. Said verdict was against, and contrary to law.

4. Errors of law occurring during the trial, and excepted to by the attorney for the defendant.

EDWARD H. CHAVELLE,
Attorney for Defendant Charles H. Ferguson.

Due service of within motion admitted this 23d day of December, 1922, and receipt of copy thereof acknowledged.

THOMAS P. REVELLE,
Attorney for Plaintiff.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Dec. 26, 1922. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [15]

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 7069.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

TOM PAPPAS, OLIVER THOMPSON, and CHARLES H. FERGUSON,
Defendants.

Motion for New Trial.

Comes now the defendant, Oliver Thompson, and moves the Court to set aside the verdict of the jury heretofore entered herein, and grant a new trial, on the following grounds:

1. Insufficiency of the evidence to justify the verdict.

2. Said verdict was against, and contrary to the evidence.

3. Said verdict was against, and contrary to law.

4. Errors of law occurring during the trial, and excepted to by the attorney for the defendant.

EDWARD H. CHAVELLE,
Attorney for Defendant Oliver Thompson.

Due service of within motion admitted this 23 day of December, 1922, and receipt of copy thereof acknowledged.

THOMAS P. REVELLE,
Attorney for Plaintiff.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Dec. 26, 1922. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [16]

United States of America, Western District of Washington, Northern Division.

No. 7069.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

TOM PAPPAS, CHARLES L. FERGUSON, and OLIVER THOMPSON,
Defendants.

Hearing on Motions for New Trial and in Arrest of Judgment and Order Denying Same.

Now, on this 26th day of December, 1922, motion for a new trial and arrest of judgment is made by counsel for defendants in the above-entitled cause. Motion is argued as to defendants Pappas, Ferguson and Thompson and said motions are denied and exception allowed. Government moves for judgment and sentence. Sentence is passed at this time.

Journal #10, page 440. [17]

United States of America, Western District of Washington, Northern Division.

No. 7069.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

TOM PAPPAS,

Defendant.

Sentence (Tom Pappas).

Comes now on this 26th day of December, 1923, the said defendant Tom Pappas into open court for sentence and being informed by the Court of the charges herein against him and of his conviction of record herein, he is asked whether he has any legal cause to show why sentence should not be passed and judgment had against him and he

nothing says save as he before hath said. Wherefore by reason of the law and the premises it is considered, ordered and adjudged by the Court that the defendant is guilty of violating the National Prohibition Act and that he be punished by being imprisoned in the King County Jail or in such other prison as may be hereafter provided for the confinement of persons convicted of offenses against the laws of the United States for the period of six months and to pay a fine of $500.00 dollars. Defendant is hereby remanded into the custody of the United States Marshal to carry this sentence into execution.

Judgment and Decree, #3, page 364. [18]

United States of America, Western District of Washington, Northern Division.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

CHARLES FERGUSON and OLIVER THOMPSON,

Defendants.

Sentence (Charles Ferguson).

Comes now on this 26th day of December, 1923, the said defendant Charles Ferguson into open court for sentence and being informed by the Court of the charges herein against him and of his conviction of record herein he is asked whether

he has any legal cause to show why sentence should not be passed and judgment had against him and he nothing says save as he before hath said. Wherefore by reason of the law and the premises, it is considered ordered and *and* adjudged by the Court that the defendant is guilty of violating the National Prohibition Act and that he be punished by being imprisoned in the King County Jail or in such other prison as may be hereafter provided for the confinement of persons convicted of offenses agains the laws of the United States for the period of six months and to pay a fine of $500.00 dollars. Defendant is hereby remanded into the custody of the United States Marshal to carry this sentence into execution.

Judgment and Decree, #3, page 364. [19]

United States of America, Western District of Washington, Northern Division.

No. 7069.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

OLIVER THOMPSON,

Defendant.

Sentence (Oliver Thompson).

Comes now on this 26th day of December, 1923, the said defendant into open court for sentence and being informed by the Court of the charges

herein against him and of his conviction of record herein, he is asked whether he has any legal cause to show why sentence should not be passed and judgment had against him and he nothing says save as he before hath said. Wherefore by reason of the law and the premises, it is considered ordered and adjudged by the Court that the defendant is guilty of violating the National Prohibition Act and that he be punished by being confined in the King County Jail or in such prison as may be hereafter provided for the confinement of persons convicted of offenses against the laws of the United States for the period of ninety days. And the said defendant is now hereby remanded ino the custody of the United States Marshal to carry this sentence into execution.

Judgment and Decree, #3, page 364. [20]

In the District Court of the United States for Western District of Washington, Northern Division.

No. 7069.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

TOM PAPPAS et al.,

Defendants.

Petition for Writ of Error.

Comes now the above-named defendant, Tom Pappas, and by his attorney and counsel, Fred

C. Brown, respectfully shows that on December 21, 1922, a jury empanelled in the above-entitled court and cause, returned a verdict finding said Tom Pappas guilty of the indictment heretofore filed in the above-entitled court and cause, and thereafter, within the time limited by law, under rules and order of this court, defendant moved for a new trial, which motion was by the Court overruled and exception thereto allowed, and likewise, within said time, and thereafter, on the 26th day of December, 1922, this defendant was, by order and judgment of the above-entitled court, in said cause, sentenced to serve a term of six months in jail and fined five hundred ($500.00) dollars.

And your petitioner, feeling himself aggrieved by this verdict, and the judgment and sentence of the Court entered herein as aforesaid, and by the orders and rulings of said Court, and proceedings in said cause, now herewith petitions this Court for an order allowing him to prosecute a Writ of Error from said judgment and sentence to the Circuit Court of Appeals of the United States for the Ninth Circuit, under the laws of the United States, and in accordance with the procedure of said court made and provided, to the end that said proceedings as herein recited, and as more fully [21] set forth in the assignments of error presented herein, may be reviewed and manifest error appearing upon the face of the record of said proceedings, and upon the trial of said cause, may be by said Circuit Court of

Appeals corrected, and that for said purpose a writ of error and citation thereon should issue as by law and ruling of the Court provided, and wherefore, premises considered, your petitioner prays that a writ of error issue, to the end that said proceedings of the District Court of the United States of the Western District of Washington, may be reviewed and corrected, said errors in said record being herewith assigned, and presented herewith, and that pending the final determination of said writ of error by said Appellate Court, an order may be entered herein that all further proceedings be suspended and stayed, and that pending such final determination, said defendant be admitted to bail.

FRED C. BROWN,
Attorney for Defendant Tom Pappas.

Received copy Jan. 2, 1923.

THOS. P. REVELLE,
Atty. for Plaintiff.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Jan. 2, 1923. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [22]

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 7069.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

TOM PAPPAS, C. FERGUSON and O. THOMPSON,

Defendants.

Petition for Writ of Error.

Comes now the above-named defendant, C. Ferguson, and by his attorney and counsel, Edward H. Chavelle, respectfully shows that on the 21st day of December, 1922, a jury empanelled in the above-entitled court and cause, returned a verdict finding said C. Ferguson, guilty of the indictment heretofore filed in the above-entitled court and cause, and thereafter, within the time limited by law, under rules and order of this Court, defendant moved for a new trial, which motion was by the Court overruled, and exception thereto allowed, and likewise, within said time filed his motion for arrest of judgment, and which was by the Court overruled, and to which an exception was allowed; and thereafter, on the 26th day of December, 1922, this defendant was by order and judgment and sentence of the above-entitled court

in said cause, sentenced to pay a fine of $500.00 and to serve a term of six months in jail.

And your petitioner, feeling himself aggrieved by this verdict, and the judgment and sentence of the Court entered herein as aforesaid, and by the orders and rulings of said Court, and proceedings in said cause, now herewith petitions this Court for an order allowing him to prosecute a writ of error from said judgment and sentence to the Circuit Court of Appeals of the United States [23] for the Ninth Circuit, under the laws of the United States, and in accordance with the procedure of said court made and provided, to the end that said proceedings as herein recited, and as more fully set forth in the assignments of error presented herein, may be reviewed and manifest error appearing upon the face of the record of said proceedings, and upon the trial of said cause, may be by said Circuit Court of Appeals corrected, and that for said purpose a writ of error and citation thereon should issue as by law and ruling of the Court provided, and wherefore, premises considered, your petitioner prays that a writ of error issue, to the end that said proceedings of the District Court of the United States of the Western District of Washington, may be reviewed and corrected, said errors in said record being herewith assigned, and presented herewith, and that pending the final determination of said writ of error by said Appellate Court, an order may be entered herein that all further proceedings be suspended

and stayed, and that pending such final determination, said defendant be admitted to bail.

EDWARD H. CHAVELLE,
Attorney for Defendant C. Ferguson.

Received a copy of the within petition this 28 day of Dec. 1922.

THOS. P. REVELLE,
Attorney for Pltf. D.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Dec. 28, 1922. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [24]

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 7069.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

TOM PAPPAS, C. FERGUSON and O. THOMPSON,
Defendants.

Petition for Writ of Error.

Comes now the above-named defendant, O. Thompson, and by his attorney and counsel, Edward H. Chavelle, respectfully shows that on December 21, 1922, a jury empanelled in the above-entitled court and cause, returned a verdict find-

ing said O. Thompson guilty of the indictment heretofore filed in the above-entitled court and cause, and thereafter, within the time limited by law, under rules and order of this Court, defendant moved for a new trial, which motion was by the Court overruled and exception thereto allowed, and likewise within said time, filed his motion for arrest of judgment, and which was by the Court overruled, and to which an exception was allowed; and thereafter, on the 26th day of December, 1922, this defendant was, by order and judgment and sentence of the above-entitled court, in said cause, sentenced to serve a term of ninety days in jail.

And your petitioner, feeling himself aggrieved by this verdict, and the judgment and sentence of the Court entered herein as aforesaid, and by the orders and rulings of said Court, and proceedings in said cause, now herewith petitions this Court for an order allowing him to prosecute a writ of error from said judgment and sentence to the Circuit Court of Appeals of the United States for the Ninth Circuit, under the laws of the United States, and in accordance with the procedure of said Court made and provided, to [25] the end that said proceedings as herein recited, and as more fully set forth in the assignments of error presented herein, may be reviewed and manifest error appearing upon the face of the record of said proceedings, and upon the trial of said cause, may be by said Circuit Court of Appeals corrected, and that for said purpose a writ

of error and citation thereon should issue as by law and ruling of the Court provided, and wherefore, premises considered, your petitioner prays that a writ of error issue, to the end that said proceedings of the District Court of the United States of the Western District of Washington, may be reviewed and corrected, said errors in said record being herewith assigned, and presented herewith, and that pending the final determination of said writ of error by said Appellate Court, an order may be entered herein that all further proceedings be suspended and stayed, and that pending such final determination, said defendant be admitted to bail.

EDWARD H. CHAVELLE,
Attorney for Defendant O. Thompson.

Received a copy of the within petition this 28 day of Dec. 1922.

THOS. P. REVELLE,
Attorney for Plaintiff.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Dec. 28, 1922. F. M. Harshberger, Clerk By S. E. Leitch, Deputy. [26]

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 7069.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

TOM PAPPAS et al.,

Defendants.

Assignment of Error.

Now comes the above-named defendant, Tom Pappas by Fred C. Brown, his counsel, and says that in the record and proceedings in the above-entitled cause there is manifest error, in this, to wit:

1. That the Court erred in allowing testimony to go to the jury during the trial of said cause, over the objection of defendant's counsel, of the testimony of various witnesses as to the statements made without the presence of the defendant as to the three charges contained in the indictment.

2. That the said Court erred in allowing testimony to go to the jury during the trial of the case, over the objection of defendant's counsel, which was excepted to at the time by the defendant's counsel, and exception allowed.

3. That the said Court erred in overruling the defendant's motion for a new trial.

4. That the said Court erred in instructing the jury with relation to a conspiracy, and fur-

ther instructing the jury that if they found a conspiracy, the evidence of one of the defendants might be used against all, to which defendant excepted and exception allowed.

5. That the Court erred in failing to instruct the jury that the statement of a conspirator is not evidence against his co-conspirator, unless there is other corroborating testimony. [27]

6. That the Court erred in denying the motion of defendant to dismiss the indictment and for an instructed verdict for the defendant upon the following grounds:

a. That the defendant in error was acting as a Deputy Sheriff of King County, and was under the direction of deputies of the Sheriff of King County in the transaction.

b. The testimony affirmatively shows that the defendant in error was acting in the transaction without any criminal intent whatever and in furtherance of the enforcement of the law by his superior officers.

c. That the entire evidence failed to show that the defendant in error transported the liquor as charged in the indictment.

d. That the entire evidence failed to show that the defendant in error had in his possession the liquor as charged in the indictment.

e. The testimony affirmatively shows that the defendant in error did not commit the offense of selling the liquor charged in the indictment, but the acts therein alleged, and essential to the crime charged, were the acts of other persons than the

defendant in error, but instead the proof of the plaintiff showed that the sale of liquor essential to the proof of the crime charged was another person's crime, and no competent testimony was offered to connect defendant in error with the offense charged.

WHEREFORE, said Tom Pappas, defendant in error, prays that judgment be reversed, and that said Court be directed to grant a new trial of said cause.

FRED C. BROWN,
Attorney for Defendant Tom Pappas.

Received copy Jan. 2, 1923.

THOS. P. REVELLE,
Atty. for Pltf. [28]

[Indorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Jan. 2, 1923. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [29]

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 7069.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

TOM PAPPAS, C. FERGUSON and O. THOMPSON,
Defendants.

Assignment of Error.

Now comes the above-named defendant in error, C. Ferguson, by Edward H. Chavelle, his counsel, and says that in the record and proceedings in the above-entitled cause there is manifest error in this to wit:

1. That the Court erred in allowing testimony to go to the jury during the trial of said cause, over the objection of defendant's counsel, of the testimony of various witnesses as to the statements made without presence of the defendant as to the three charges contained in the indictment.

2. That the Court erred in allowing testimony to go to the jury during the trial of said cause over the objection of defendant's counsel, of alleged previous arrests of the defendant.

3. That the said Court erred in allowing testimony to go to the jury during the trial of the case, over the objection of defendant's counsel, which was excepted to at the time by the defendant's counsel, and exception allowed.

4. That the said Court erred in overruling the defendant's motion for a new trial.

5. That the said Court erred in overruling defendant's motion in arrest of judgment.

6. That the said Court erred in instructing the jury [30] with relation to a conspiracy, and further instructing the jury that if they found a conspiracy, the evidence of one of the defendants might be used against all, to which defendant excepted and exception allowed.

7. That the Court erred in failing to instruct

the jury that the statement of a conspirator is not evidence against his co-conspirator, unless there is other corroborating testimony.

8. That the Court erred in denying the motion of the defendant to dismiss the third count of the indictment charging the sale, and for an instructed verdict for the defendant, upon the following grounds:

a. The entire evidence failed to show that the defendant in error sold the liquor as charged in the indictment, or that it was sold under his direction.

b. The testimony affirmatively shows that the defendant in error did not commit the offense of selling the liquor charged in the indictment, but the acts therein alleged, and essential to the crime charged, were the acts of other persons than the defendant in error, and without his direction, authority or consent, and that no evidence of the plaintiff connected the defendant in error with the offense charged in the indictment, but instead the proof of the plaintiff showed that the sale of liquor essential to the proof of the crime charged was another person's crime, and no competent testimony was offered to connect the defendant in error with the offense charged.

WHEREFORE, the said C. Ferguson, defendant in error, prays that the judgment be reversed, and that the said Court be directed to grant a new trial of said cause.

EDWARD H. CHAVELLE,
Attorney for Defendant C. Ferguson.

Received a copy of the within assignment of error, this 28 day of Dec. 1922.

THOS. P. REVELLE,
Attorney for Plf. [31]

[Indorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Dec. 28, 1922. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [32]

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 7069.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

TOM PAPPAS, C. FERGUSON and O. THOMPSON,
Defendants.

Assignment of Error.

Now comes the above-named defendant in error, O. Thompson, by Edward H. Chavelle, his counsel, and says that in the record and proceedings in the above-entitled cause there is manifest error in this, to wit:

1. That the Court erred in allowing testimony to go to the jury during the trial of said cause, over the objection of defendant's counsel, of the testimony of various witnesses as to the statements

made without the presence of the defendant as to the three charges contained in the indictment.

2. That the Court erred in allowing testimony to go to the jury during the trial of said cause, over the objection of defendant's counsel, of alleged previous arrest of the defendant.

3. That the said Court erred in allowing testimony to go to the jury during the trial of the case, over the objection of defendant's counsel, which was excepted to at the time by the defendant's counsel, and exception allowed.

4. That the said Court erred in overruling the defendant's motion for a new trial.

5. That the said Court erred in overruling defendant's motion in arrest of judgment.

6. That the said Court erred in instructing the jury with relation to a conspiracy, and further instructing the jury [33] that if they found a conspiracy, the evidence of one of the defendants might be used against all, to which defendant excepted and exception allowed.

7. That the Court erred in failing to instruct the jury that the statement of a conspirator is not evidence against his co-conspirator, unless there is other corroborating testimony.

8. That the Court erred in denying the motion of the defendant to dismiss the third count of the indictment charging the sale, and for an instructed verdict for the defendant, upon the following grounds:

a. The entire evidence failed to show that the defendant in error sold the liquor as charged in

the indictment, or that it was sold under his direction.

b. The testimony affirmatively shows that the defendant in error did not commit the offense of selling the liquor charged in the indictment, but the acts therein alleged, and essential to the crime charged, were the acts of other persons than the defendant in error, and without his direction, authority or consent, and that no evidence of the plaintiff connected the defendant in error with the offense charged in the indictment, but instead the proof of the plaintiff showed that the sale of liquor essential to the proof of the crime charged was another person's crime, and no competent testimony was offered to connect the defendant in error with the offense charged.

WHEREFORE, the said O. Thompson, defendant in error, prays that the judgment be reversed, and that the said Court be directed to grant a new trial of said cause.

EDWARD H. CHAVELLE,
Attorney for Defendant O. Thompson.

Received a copy of the within assignment this 28 day of Dec. 1922.

THOS. P. REVELLE,
Attorney for Plf.—D. [34]

[Indorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Dec. 28, 1922. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [35]

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 7069.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

TOM PAPPAS et al.,

Defendants.

Order Allowing Writ of Error.

On this 2d day of January, 1922, came the defendant, Tom Pappas, by his attorney, Fred C. Brown, and filed herein and presented to the Court his petition praying for the allowance of a writ of error and assignment of error intended to be urged by him, praying, also, that a transcript of the record and proceedings and papers upon which judgment herein was rendered, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Judicial District, and that such other and further proceedings may be had as may be proper in the premises.

On consideration whereof, the Court does allow the writ of error upon the defendant giving bond according to law in the sum of sixteen hundred dollars ($1600.00), which shall operate as a supersedeas bond.

EDWARD E. CUSHMAN,

Judge.

Received copy Jan. 2, 1923.

THOS. P. REVELLE,
Atty. for Plaintiff.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Jan. 2, 1923. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [36]

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 7069.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

TOM PAPPAS, C. FERGUSON, and O. THOMPSON,
Defendants.

Order Allowing Writ of Error.

On this 27th day of December, 1922, came the defendant, C. Ferguson, by his attorney, Edward H. Chavelle, and files herein and presented to the Court his petition praying for the allowance of a writ of error and assignment of error intended to be urged by him, praying also, that a transcript of the records and proceedings and papers upon which judgment herein was rendered, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Judicial Dis-

trict, and that such other and further proceedings may be had as may be proper in the premises;

On consideration whereof, the Court does allow the writ of error upon the defendant giving bond according to law in the sum of one thousand six hundred dollars, which shall operate as a supersedeas bond.

JEREMIAH NETERER,
Judge.

Received a copy of the within order this 28 day of December, 1922.

THOS. P. REVELLE,
Attorney for Plf.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Dec. 28, 1922. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [37]

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 7069.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

TOM PAPPAS, C. FERGUSON, and O. THOMPSON,
Defendants.

Order Allowing Writ of Error.

On this 27th day of December, 1922, came the defendant, O. Thompson, by his attorney, Edward H. Chavelle, and filed herein and presented to the Court his petition praying for the allowance of a writ of error and assignment of error intended to be urged by him, praying, also, that a transcript of the record and proceedings and papers upon which judgment herein was rendered, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Judicial District, and that such other and further proceedings may be had as may be proper in the premises;

On consideration whereof, the Court does allow the writ of error upon the defendant giving bond according to law in the sum of one thousand dollars, which shall operate as a supersedeas bond.

JEREMIAH NETERER,
Judge.

Received a copy of the within order this 28th day of December, 1922.

THOS. P. REVELLE,
Attorney for Plf.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Dec. 28, 1922. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [38]

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 7069.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

TOM PAPPAS et al.,

Defendants.

Bond on Writ of Error.

KNOW ALL MEN BY THESE PRESENTS: That we, Tom Pappas, as principal, and George H. Moss and Mrs. Geo. H. Moss, his wife, James Pappas and Madiline Pappas, his wife, of Seattle, Washington, as sureties, jointly and severally acknowledge ourselves to be indebted unto the United States of America, in the sum of ($1600.00) dollars, lawful money of the United States, to be levied on our goods and chattels, lands and tenements, upon this condition:

WHEREAS, the said Tom Pappas has sued out a writ of error from the judgment of the District Court of the United States for the Western District of Washington, in the case in said court wherein the United States of America is plaintiff, and said Tom Pappas is one of the defendants, for a review of the said judgment in the United States Circuit Court of Appeals for the Ninth Circuit;

Now, if the said Tom Pappas shall prosecute his writ of error to effect and answer all damages and costs if he fail to make his plea good, and shall appear and surrender himself in the District Court of the United States for the Western District of Washington, and after the filing in the said District Court of the Mandate of the said Circuit Court of Appeals, and from time to time thereafter as may be required, shall answer any further proceedings, and abide by and perform any judgment or order which may be had therein or [39] rendered in this case, and shall abide and perform any judgment or order which may be rendered in the United States Circuit Court of Appeals for the Ninth District, and not depart from the said Court or District without leave thereof, then this obligation shall be void; otherwise, to remain in full force and virtue.

Witness our hands and seals this 30th day of December, 1922.

TOM PAPPAS.
GEORGE H. MOSS.
MRS. GEO. H. MOSS.
JAMES PAPPAS.
MADELINE PAPPAS.

O. K.—THOS. P. REVELLE,
U. S. Attorney.

Approved:
EDWARD E. CUSHMAN,
Judge.

Subscribed and sworn to before me this 30th day of December, 1922.

[Seal] FRED C. BROWN,
Notary Public in and for the State of Washington,
Residing at Seattle.

United States of America,
Western District of Washington,
Northern Division,—ss.

Geo. H. Moss and Mrs. Geo. H. Moss, his wife, being first duly sworn, on oath deposes and says, each for himself and not one for the other; that they are residents of the above-entitled District, and that after paying all just debts and liabilities, they are worth the sum of $—— in community real property, subject to execution within said District, over and above all exemptions. That they are the owners of the following real property, to wit: Lots 1 and 2, block 22, Hill Tract Addition to City of Seattle.

GEO. H. MOSS.
MRS. GEO. H. MOSS.

Subscribed and sworn to before me this 30th day of December, 1922.

[Seal] FRED C. BROWN,
Notary Public in and for the State of Washington,
Residing at Seattle.

O. K.—THOS. P. REVELLE,
U. S. Attorney. [40]

United States of America,
Western District of Washington,—ss.

James Pappas and Madiline Pappas, his wife,

being first duly sworn, on oath deposes and says each for himself and not one for the other; that they are residents of the above-entitled District, and that after paying all just debts and liabilities, they are worth the sum of $—— in community real property, subject to execution within said District, over and above all exemptions; that they are the owners of the following real property, to wit: Fairview Homestead, Ass'n. Plat N.½ of 4/8.

JAMES PAPPAS.
MADELINE PAPPAS.

Subscribed and sworn to before me this 30th day of December, 1922.

[Seal] FRED C. BROWN,
Notary Public in and for the State of Washington, Residing at Seattle.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. January 2, 1923. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [41]

In the District Court of the United States, for the Western District of Washington, Northern Division.

No. 7069.

CHARLES FERGUSON,

Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

Bond on Appeal.

We, Charles Ferguson, as principal, and Michael Cohen, Joseph Danz and Minnie Danz, his wife, as sureties, all of Seattle, Washington, jointly and severally acknowledge ourselves to be indebted unto the United States of America in the sum of sixteen hundred ($1600.00) dollars, lawful money of the United States, to be levied of our goods and chattels, lands and tenements, for the payment of which, well and truly to be made, we bind ourselves and each of us, our heirs and executors, jointly and severally, firmly by these presents.

The condition of the above obligation is such that whereas in the above-entitled cause a writ of error has been issued to the Circuit Court of Appeals for the Ninth Circuit from the judgment and sentence entered therein, and an order has been entered fixing the amount of the bail bond for the release of the defendant, Charles Ferguson, upon

bail, pending the determination of said writ of error by said appellate court, in the sum of $1.600.

Now, therefore, if the said Charles Ferguson, as principal obligor, shall appear and surrender himself in the above-entitled court and from time to time thereafter as may be required to answer any further proceedings, and shall obey and perform any judgment or order which may be had or rendered in said cause and shall abide by and perform any judgment or order which may be rendered in the said United States Circuit Court of Appeals for the Ninth Circuit, [42] and shall not depart from said District without leave first having been obtained from the Court, then this obligation shall be null and void; otherwise of full force and effect.

IN WITNESS WHEREOF we have set our hands and seals this 27th day of December, 1922.

CHARLES FERGUSON, (Seal)
Principal.
MICHAEL COHEN. (Seal)
JOSEPH DANZ. (Seal)
MINNIE DANZ. (Seal)

O. K.—THOS. P. REVELLE,
U. S. Attorney.

Approved:

NETERER,
Judge.

United States of America,
Western District of Washington,
Northern Division,—ss.

I, Michael Cohen, one of the sureties within named and a resident of said District, do solemnly swear that, after paying all my just debts and liabilities, I am worth in my sole and exclusive right the sum of $1,600 in real estate within the jurisdiction of the above-entitled court and subject to levy, execution and sale, and that I am an unmarried man.

MICHAEL COHEN.

Subscribed and sworn to before me this 27th day of December, 1922.

[Seal] WALTER METZENBAUM,
Notary Public in and for the State of Washington, Residing at Seattle.

United States of America,
Western District of Washington,
Northern Division,—ss.

We, Joseph Danz and Minnie Danz, his wife, sureties within named and residents of said District, do each solemnly swear after paying our just debts and liabilities, we are worth the sum of $1,600 in real estate within the jurisdiction of the above-entitled court and [43] subject to execution, levy and sale.

JOSEPH DANZ.
MINNIE DANZ.

Subscribed and sworn to before me this 27th day of December, 1922.

[Seal] WALTER METZENBAUM,
Notary Public in and for the State of Washington, Residing at Seattle.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. December 28, 1922. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [44]

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 7069.

OLIVER THOMPSON,
Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,
Defendant in Error.

Bond on Appeal.

We, Oliver Thompson, as principal, and Michael Cohen and Leo C. Jacobson, as sureties, all of Seattle, Washington, jointly and severally acknowledge ourselves to be indebted unto the United States of America in the sum of One Thousand ($1,000) Dollars, lawful money of the United States to be levied of our goods and chattels, lands and tenements, for the payment of which, well and truly to be made, we bind ourselves and each of us,

our heirs and executors, jointly and severally, firmly by these presents.

The condition of the above obligation is such that whereas in the above-entitled cause a writ of error has been issued to the Circuit Court of Appeals for the Ninth Circuit from the judgment and sentence entered therein, and an order has been entered fixing the amount of the bail bond for the release of the defendant, Oliver Thompson, upon bail pending the determination of said writ of error by said Appellate Court in the sum of $1,000.00.

Now, therefore, if the said Oliver Thompson, as principal obligor, shall appear and surrender himself in the above-entitled court and from time to time thereafter as may be required to answer any further proceedings, and shall obey and perform any judgment or order which may be had or rendered in said cause and shall abide by and perform any judgment or order which may be rendered in the said United ~~United~~ Circuit Court of Appeals for the Ninth Circuit [45] and shall not depart from said District without leave first having been obtained from the Court, then this obligation shall be null and void, otherwise of full force and effect.

IN WITNESS WHEREOF we have set our hands and seals this —— day of December, 1922.

OLIVER THOMPSON, (Seal)
Principal.
MICHAEL COHEN. (Seal)
LEO. C. JACOBSON, (Seal)

O. K.—THOS. P. REVELLE,
U. S. Attorney.

Approved:

NETERER,
Judge.

United States of America,
Western District of Washington,
Northern Division,—ss.

I, Michael Cohen, one of the sureties, within named and a resident of said District, do solemnly swear that, after paying all my just debts and liabilities, I am worth the sum of $1,000 in real estate within the jurisdiction of the above-entitled court and subject to levy, execution and sale and that I am an unmarried man.

MICHAEL COHEN.

Subscribed and sworn to before me this 27th day of December, 1922.

[Seal] WALTER METZENBAUM,
Notary Public in and for the State of Washington,
Residing at Seattle.

United States of America,
Western District of Washington,
Northern Division,—ss.

I, Leo C. Jacobson, one of the sureties within named and residents of said District, do solemnly swear that after paying my just debts and liabilities, I am worth the sum of $1,000 in real estate within the jurisdiction of the above-entitled court and subject to execution and levy and sale in my own and separate right.

LEO C. JACOBSON. [46]

Subscribed and sworn to before me this 27th day of December, 1922.

[Seal] WALTER METZENBAUM,
Notary Public in and for the State of Washington, Residing at Seattle.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. December 28, 1922. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [47]

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 7069.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

TOM PAPPAS, C. FERGUSON, and O. THOMPSON,
Defendants.

Order Extending Time to and Including February 15, 1922, to File Record and Docket Cause.

For good cause now shown, it is ORDERED that the time for filing the record in the above-entitled cause in the office of the Clerk of the Circuit Court of Appeals be and the same is hereby extended to the 15th day of February, 1922.

Done in open court, this 29th day of December, 1922.

NETERER,
United States District Judge.

Received copy Dec. 28, 1922.

THOS. P. REVELLE,
Atty. for Plaintiff.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Dec. 29, 1922. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [48]

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 7069.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

TOM PAPPAS et al.,
Defendants.

Order Extending Time to and Including February 28, 1923, to File Record and Docket Cause.

Upon the application of the defendant in the above cause for an extension of time within which to lodge the appellate record in the Court of Appeals, the United States Attorney consenting thereto on behalf of the plaintiff, it is by the Court ordered that the time within which to lodge and file the appellate record in the above-entitled cause

in the Court of Appeals for the Ninth Circuit, to wit, thirty (30) days allowed by law is hereby extended from and after its expiration on February ——, 1923, to and including the 28th day of February, 1923, during which time said record may be returned and filed in the said Court of Appeals with like force and effect as if filed and lodged within thirty (30) days.

Done in open court this 9th day of February, 1923.

JEREMIAH NETERER,
Judge.

O. K.—DeWOLFE EMORY,
Asst. U. S. Attorney.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Feb. 9, 1923. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [49]

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 7069.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

TOM PAPPAS, C. FERGUSON, and O. THOMPSON,
Defendants.

Order Extending Time to and Including April 1, 1923, to File Record and Docket Cause.

For good cause now shown, it is ORDERED, that the time for filing the record in the above-entitled cause, in the office of the clerk of the above-entitled court, be and the same is hereby extended to the 1st day of April, 1923.

Done in open court this 23d day of February, 1923.

JEREMIAH NETERER,
United States District Judge.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Feb. 23, 1923. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [50]

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 7069.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

TOM PAPPAS, CHARLES L. FERGUSON and OLIVER THOMPSON,
Defendants.

Bill of Exceptions of Charles L. Ferguson and Oliver Thompson.

BE IT REMEMBERED, that heretofore, and, to wit, on the 20th day of December, 1922, the above-entitled cause came for trial in the above Court, before the Honorable Jeremiah Neterer, one of the Judges of said Court, sitting with a jury, plaintiff appearing by Charles E. Allen, Assistant United States Attorney for said Court and district, and the defendants, Charles L. Ferguson and Oliver Thompson appearing by Edward H. Chavelle, their attorney and counsel, and defendant Tom Pappas appearing by Fred C. Brown, his attorney.

A jury having been duly empanelled and sworn to try the cause, and counsel for plaintiff having made his opening statement to the jury, thereupon the following proceedings were had, and testimony given, to wit:

Testimony of H. V. Mooring, for the Government.

H. V. MOORING, called on behalf of the Government, being first duly sworn, testified as follows:

That he is a Federal Prohibition Agent. On the 28th day of June, 1922, he had a conversation with Thomas Pappas at the entrance of the City Taxi, at 103–½ Prefontaine Place, Third Avenue and Yesler Way. Tom Pappas was at the door and H. V. Mooring asked him where Gus Demus was, and Pappas said he was out. Mooring said

(Testimony of H. V. Mooring.)

"I was going to get some stuff," and he said, "Why not let me fix you up?" Mooring said, "That is all right with me; what is [51] the price?" and he stated the price, and Mooring said "I want to get it to-night; I want to get down to Centralia," and he said "Where is your car," and Mooring said, "It is out at my house," and Pappas said, "We will have to go and get it then." The witness and said Tom Pappas got on a street-car and went to the house of Mooring at 130 Fifteenth Avenue, and went in the house. The defendant, Pappas said to Mooring, "You get the car ready," and asked the wife of witness if he could use the phone, and went out and used the phone, and witness went and got the car out of the garage and came in the house again, and Pappas said, "The deal is off, Harry. The boys are busy," and Mooring said, "What are they doing?" Pappas said, "They are unloading," and Mooring said, "Why not drive down there with my car and I can get my stuff and go on." Pappas said, "We cannot do business that way, but I will fix you up to-morrow," and Mooring said, "All right, that will do me as long as I can leave at night time from here." And he went away.

Mooring, the witness, then testified that the next time he heard from Pappas was about twelve o'clock the following day. He asked Pappas if he was handling much of it and he said "Quite a bit. If you want to do business with me why not order from Centralia," and Mooring said, "It is pretty dangerous that way." He said, "If you will send

(Testimony of H. V. Mooring.)

me a wire, if you want just common stuff ask for so much lubricating oil, and if you want bonded stuff say that you want high grade lubricating oil."

The witness, Mooring, then testified that the next time he saw Pappas was on the 30th, the following day. Pappas drove up and said, "I have to hire a car to get this stuff. My own car is broken down and they will not get it fixed in time." That was about twelve o'clock. Defendant Pappas then said, "I am sorry I kept you waiting but I am going after it right now. Where shall we put it?" Mooring said, "I will leave it in the garage. I will [52] leave the garage doors open and you can drive around the alleyway." He asked Mooring how many cases he wanted. Mooring said, "Just got two," and held up his fingers (indicating).

Mooring, the witness, then testified, that about four o'clock the same day, he saw Pappas again, and said to him, "Have you got it?" and he, Pappas, said "Sure," and opened the left-hand back door of his car and pointed out two sacks. Mooring said, "What did you get," and Pappas said "Pebble Ford, what you ordered." There were some other sacks, and Mooring said, "What are the others." Pappas said, "I will deliver them further on." Then Pappas said, "What are going to cover it up with?" Mooring said "This tent," and they pulled the tent over to the garage door, and Mooring said, "While you count the money out I will get the stuff out," and handed him the money a few feet outside the garage, and walked

(Testimony of H. V. Mooring.)

in the garage by the side of his car. Mooring said, "I handed him fifty-five dollars in notes I had given Mr. Anderson and the other agent a check for a few hours before, because I did not have enough, and a check for eighty dollars. Fifty-five dollars in currency and an eighty-dollar check." Witness Mooring identified the currency and the same was offered in evidence and marked for identification, same being identified by the witness as being the same money, two twenties, and a ten, and some twos and a one, and an eighty-dollar check, and marked as Government's Exhibit "I." Witness identified sacks as two sacks of liquor delivered by Pappas to him, containing twenty-four bottles of Pebble Ford, whereupon same were offered and admitted as Government's Exhibits.

Witness Mooring then testified that three men were placed under arrest, and Pappas remarked that he did not think Mooring would do anything like that to a friend, and Mooring told him he was [53] *was* not working for friends, but was working for Uncle Sam. The money was found in Pappas' hand, and he said that it was not enough. Three men were placed under arrest and turned over to Mr. Anderson, and he took them into the house. The arrest was made between three and four o'clock.

Later the prisoners were brought to Mr. Whitney's office, and further examined. Mr. Ferguson, the defendant, Mr. Mooring testified, admitted that he was hauling the stuff, but that Pappas was making the deal, and that he, Ferguson, was not

(Testimony of H. V. Mooring.)

responsible, and the liquor was not his. He was just hauling it for Mr. Pappas.

On cross-examination, the witness, questioned by Mr. BROWN, stated:

That he went with Mr. Pappas to his house, and he told the other officers in Mr. Whitney's office, that he was a deputy sheriff. That he heard him make the statement that he was working out of the Sheriff's office *office*. Witness further stated that he did not say he was working out of the Sheriff's office in this case. The license number of the car was 12,240. Mr. Pappas, when he got out of the car, did not go toward the house.

On cross-examination of the witness, questioned by Mr. CHAVELLE, witness MOORING stated:

That he never saw the defendant Thompson until he drove up in the car; that the curtains of the car were down; that Mr. Thompson remained sitting in the car until he was arrested and told to get out of the car. All the transactions were had with Mr. Pappas, and the check was made out on the front fender of Mooring's car right at the time, in the garage, some fifteen or twenty feet away from the car that Thompson was in; that Pappas had told him that he had to hire a car, earlier in the afternoon, and that his, [54] Pappas', car had broken down; that the stuff was so covered that he could not see what was in the packages; that the liquor was unloaded into the vault.

(Testimony of Maude Mooring.)

On cross-examination of H. V. MOORING, questioned by Mr. BROWN, the witness testified:

The car drove up the alleyway, and was not parked at the curb.

Testimony of Maude Mooring, for the Government.

MAUDE MOORING, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

That she is the wife of H. V. Mooring, Federal Prohibition Agent, and lives at 3216 Freeman Avenue; that on the 29th and 30th of June, 1922, she lived at 130–15th Avenue North. That she saw Mr. Pappas on the 29th day of June, 1922, at her house. He came with her husband, who introduced Mr. Pappas to her. Mr. Pappas asked to use the telephone, and said to her husband, "Well, Harry, get the car ready, and I will telephone." After he had phoned, her husband came into the room after looking after the car, and Pappas said, "Well, I guess it is off for to-night, Harry, the boys are out now after the load." Mr. Mooring said, "Can we go out in my car?" and Pappas said, "No, we cannot get it. I have three cars, and the boys have a truck." Then he left after that. Witness did not see him the next day, but that evening he said, "Well, I will deliver that to-morrow some time early in the afternoon."

(Testimony of Maude Mooring.)

On cross-examination, questioned by Mr. BROWN, the witness MAUDE MOORING testified:

That she did not remember the number of times she called up Pappas the following day.

On cross-examination, witness, questioned by Mr. CHAVELLE, testified: [55]

That Mr. Pappas had said something about his car being broken down, and said, "We have three cars, and the boys have a truck." Witness did not hear him say anything about hiring a car.

Testimony of Walter M. Justi, for the Government.

WALTER M. JUSTI, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

That he is a Federal Prohibition Agent; that he knows Mr. Pappas, and first saw him on the night of the 29th of June, 1922. Agents Mooring, Anderson, and Mr. Hillgard and Mr. Littlefield and witness went to the Athens Cafe. Witness heard no conversations, but saw Mooring and Pappas and was on the street-car with Mooring and Pappas, but it was impossible to distinguish anything they said. They went out to Mooring's house. About 2:30 o'clock the following afternoon, the 30th day of June, 1922, Mr. Pappas drove up to the house of Mr. Mooring, with Mr. Ferguson, and Mr. Mooring went out and spoke to him. Witness Justi was inside the house looking through the window, and could not hear any conversation, but

(Testimony of Walter M. Justi.)
could see Mr. Pappas and Mr. Ferguson in the car. They drove away, and Mr. Mooring returned to the house. The next time he saw the defendant Pappas, was when he put them under arrest. He saw the money and the check. At the time of the arrest, he, with other prohibition agents, were back of Mr. Mooring's car in his garage, and heard the car drive up there, but could not see it on account of their position behind Mr. Mooring's car. Then he heard someone say, "What are you going to cover it with?" and Mr. Mooring answered, "With this tent," and then he saw them drag a tent which was laying opened out on the grass there, over the garage door, and at the garage door was Mr. Mooring and Mr. Pappas, where they had the money transaction, which consisted of Mr. Mooring handing him some marked bills and a check. [56] The money and check were rolled up and had a rubber band around it, and Mr. Pappas took the rubber off, and counted the money, and he said, "This is not enough." Mr. Mooring said something like, "That makes us square, doesn't it?" and witness Walter M. Justi rushed out, together with Agent Anderson, and approached Pappas, who had the money in his right hand, and witness grabbed him by the right wrist and swung him around to Mr. Anderson, and said "Hold him, Max, and get the money," and witness Justi went on to the car, and Mr. Ferguson was in the car, and put him under arrest, and put Mr. Thompson, who was standing alongside the car, also under arrest. Then they took the defendants into Mooring's

(Testimony of Walter M. Justi.)

house and started to make a search of them for weapons, and anything of that nature. Agent Anderson said, "This fellow has got a star on him" and he pulled back Mr. Pappas' coat and he had a deputy sheriff's star, and Witness Justi said, "Take it off him," and Anderson unfastened it and took it off. The witness Justi had a book where he copied the numbers of the marked bills. The arrest was made about four o'clock. There was no further conversation had with the defendants. Four sacks of liquor and three sacks of beer were identified by the witness. None of the liquor was taken from the car.

On cross-examination, questioned by Mr. BROWN, the witness testified:

Mr. Mooring asked Mr. Pappas to assist him in pulling the tent over from the garage.

On cross-examination, questioned by Mr. CHAVELLE, the witness testified:

Mr. Thompson was standing by the car and Mr. Ferguson was in the car, and as far as he knows Mr. Thompson and Mr. Ferguson had nothing to do with the transaction. [57]

On recross-examination, questioned by Mr. BROWN, witness testified:

That he could not see the car when it drove up, and did not know who was in the car, when it drove up.

Testimony of Max Anderson, for the Government.

MAX ANDERSON, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

That he is a Federal Prohibition Agent, and was such on the 29th and 30th of June, 1922. That he saw Tom Pappas on the 29th day of June, 1922. That defendant Pappas went with Mr. Mooring on the street-car out to Mr. Mooring's house. On the 30th day of June, 1922, he saw Mr. Pappas, Mr. Ferguson and Mr. Thompson at Mr. Mooring's house; that the witness was with other prohibition agents at the house of Mr. Mooring, behind the car of Mr. Mooring's in his garage; another machine came up, but he did not see who was driving it, but he thought Mr. Ferguson was sitting at the wheel. Mr. Pappas stepped over to the garage, and Mr. Thompson was standing alongside the machine. Mr. Mooring made a deal to buy some whiskey and paid some money over to Mr. Pappas. The money was in Mr. Mooring's possession when witness first acted. It was handed over to Mr. Pappas. Mr. Mooring said to Pappas, "Count the money and see if it is correct," and he said, "All right, boys, bring it here," and then we stepped out and Mr. Justi grabbed the arm of Pappas, and he had the money in his hand, and witness Anderson took it away from him. Defendant Pappas had a special deputy sheriff's star, which witness Anderson took. Witness asked him what he carried it for. He did not say anything at the time, but they took him in the house,

(Testimony of Max Anderson.)

and then Pappas said he was a deputy sheriff, and had been working on Ferguson and Thompson for some time, to get them. [58]

Mr. CHAVELLE.—I object to that.

The COURT.—The objection is sustained.

Mr. BROWN.—I think it is admissible as conversation between the parties.

The COURT.—Propound the question again.

(Last question read.)

The COURT.—He may answer.

Mr. CHAVELLE.—Exception.

Mr. ANDERSON.—(Continuing.) Mr. Pappas said he was a deputy sheriff, and had been working on Ferguson and Thompson for some time to land them for selling liquor. At the time of the arrest the liquor was in the back of the car, and Mr. Pappas was at the garage. Mr. Ferguson was at the wheel of the machine, and Mr. Thompson was standing alongside the machine. The liquor was packed in common gunny sacks. The time of the day was about half past three or four o'clock.

The witness accompanied the defendants to Mr. Whitney's office. The only conversation witness heard was in Mr. Whitney's office, when Mr. Pappas said to Mr. Mooring, "I never thought you would do this to me." Mr. Ferguson did not say anything in the presence of witness. Witness did not hear Thompson say anything. He stated that he heard Mr. Thompson say at the garage that "I was just

(Testimony of Max Anderson.)

riding with these people" and Mr. Ferguson said he was just hauling this load for Mr. Pappas.

Witness ANDERSON, on cross-examination, questioned by Mr. BROWN, testified:

That he saw through the glass in the back of the machine; that he could see Mr. Pappas, who was the only one of the defendants in the garage; he could see the upper part of his body, and saw the roll of money pass to Mr. Pappas. It was not rolled up, but [59] was spread out. Mr. Mooring said, "Count it," and witness then arrested Mr. Pappas. He took the money from Mr. Pappas and searched him, and found a badge on him; that Mr. Ferguson did not blame any one for his arrest; Mr. Ferguson was in the car all the time, until he was arrested and then taken into the house.

MAX ANDERSON, on cross-examination, questioned by Mr. CHAVELLE, testified:

Mr. Ferguson, just as soon as he got a chance to say anything, said his car was hired, and that Mr. Thompson was just riding along; that witness was looking through an oval glass 7x24, in the back of the machine, and saw the transaction.

On redirect examination by Mr. ALLEN, witness MAX ANDERSON, testified:

Q. Counsel inquired about the car; Mr. Ferguson said it was his car, did he not?

A. Yes, sir.

(Testimony of W. M. Whitney.)

Mr. CHAVELLE.—I object to the question on the ground it is leading, and ask to have the answer stricken.

The COURT.—I will let the answer stand.

Testimony of W. M. Whitney, for the Government.

W. M. WHITNEY, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

"My name is William M. Whitney. I am Assistant Prohibition Director and Legal Advisor. I know Mr. Ferguson and Mr. Thompson. I have known them for nearly a year, not quite that long, and I saw Mr. Pappas for the first time on the afternoon of June 30, 1922."

Q. Did you have a conversation with them on the afternoon of June 30th. A. I did. [60]

Q. What was it?

Mr. CHAVELLE.—I object to the question on the ground that it is incompetent, immaterial and irrelevant and no proper foundation laid for it.

The COURT.—A conversation when?

Mr. ALLEN.—On the 30th of June this year.

Q. I will ask you where?

A. In the prohibition director's office after he was taken down by Mr. Anderson. I talked with all three of them.

Q. What did Mr. Pappas say?

A. Mr. Pappas at that time stated that he had employed or gotten in touch with Mr. Ferguson to deliver some whiskey---

(Testimony of W. M. Whitney.)

Mr. CHAVELLE.—I object to the conversason for the reason that it is incompetent, irrelevant, immaterial and no proper foundation has been laid for the question; no showing whether the statement was voluntary or involuntary and whether the defendants were under arrest.

The COURT.—The defendants were all together there?

A. The conversation—my examination was separately, but I warned each one of them first of their constitutional right and told them they did not have to say anything, and anything they said would be used against them, and they did not have to say anything that would incriminate themselves, and what was said would have to be said freely and voluntarily.

Mr. CHAVELLE.—I object to what Mr. Pappas said as not being in the presence of Mr. Ferguson or Mr. Thompson.

The COURT.—The jurors will not consider any statements on the part of Mr. Pappas with relation to any of the other defendants, that was not made in the presence of the other defendants. Let me ask you, Mr. [61] Allen, does this statement you are seeking to elicit from Mr. Pappas, is that with relation to himself more particularly, or to the other defendants?

Mr. ALLEN.—The statement that Mr. Pappas made to Mr. Whitney was with relation to himself. I will limit my question to that extent.

The COURT.—Yes.

(Testimony of W. M. Whitney.)

Q. State the conversation with Mr. Pappas as far as it related to himself.

A. Yes, I asked him how he got in this jam, or words to that effect, and he stated that he was a deputy sheriff, that he had a commission and badge, and I had them lying before me, and stated that he was a deputy sheriff, and I asked him if he had not made the deal to sell this whiskey to Mr. Mooring himself, and he said he had, and I asked him if he had any other relation with anybody else, and he said he had not, that he dealt solely and wholly with Agent Mooring with reference to the sale of these two cases of whiskey, and I asked him if he had communicated with Mr. Starwich, and he said he had not talked with Mr. Starwich for more than three weeks; he stated he had only received pay on one or two occasions, which was something more than a year previously, and then he was paid for finding a still, but that was over a year prior to this affair. I asked him if he were in good faith working as a deputy sheriff, why he had not communicated with Sheriff Starwich, and he said he had talked two or three days previously with Deputy Sheriffs Hill and Ramage, about apprehending Mr. Ferguson.

Mr. CHAVELLE.—I object to any conversation about Mr. Ferguson.

The COURT.—The jurors will disregard any statements [62] made by Mr. Pappas as to the defendants Ferguson and Thompson.

(Testimony of W. M. Whitney.)

A. (Continued.) I then asked him if he had notified the sheriff's office or any of the deputies in the sheriff's office, or any representative of that office, as to this deal with Mr. Mooring, and he stated he had not. I asked him if he intended to arrest Mr. Mooring or Mr. Ferguson or Mr. Thompson or any one else, and he said he did not intend to arrest them at that time, but intended to report to the sheriff's office later, and I asked him if he did not intend to make an arrest how he expected me to believe he was acting in good faith as a deputy sheriff, and he then stated he thought if he could play Mr. Ferguson along he might find out where he kept his cache.

Mr. CHAVELLE.—I object to that for the same reason.

The COURT.—Yes. The jurors will disregard that.

A. (Continuing.) I do not want to answer improperly, but in order to state—

The COURT.—I understand.

A. (Continuing.) And then I asked him about the money, whether the money had not been given to him by Mr. Mooring, but he said it was not the price that was agreed upon; he understood it was seventy dollars a case and Mr. Mooring only gave him a hundred and thirty-five dollars, and I then asked him if he had seen Mr. Starwich in any way, shape or form regarding this transaction and he said he had not talked to Mr. Starwich at all about this, but that he had only been requested

(Testimony of W. M. Whitney.)

—or he had talked to Mr. Hill and Mr. Ramage some days prior, and I asked how much whiskey was in the car, and he said four sacks and some beer. I asked him how they were riding out there, and he said the three of them were in the front seat, and Mr. Ferguson was driving the car. I asked him where [63] he had gotten in touch with Mr. Ferguson—

Mr. CHAVELLE.—I object to that. I do not think that is fair to tell that to this jury. Certainly not.

The COURT.—I am inclined to think that is getting—

Witness WHITNEY.—(Continuing.) He stated to me that he had seen Mr. Mooring the night before and had gone out to his house to talk over this transaction, stating that Mr. Mooring had first approached him in the Athens Cafe regarding the sale of whiskey, and he had gone out to Mr. Mooring's house on the night previous to the arrest, and stated also he had gone out in the afternoon, about an hour and a half previous to the arrest, and then stated he had been picked up about a little after four o'clock at the Times Building, and taken out again to Mr. Mooring's house where they were arrested. I remember one other matter that happened during the course of the conversation. Mr. Mooring came in at the close of the interview and Mr. Mooring asked him when he was stating that he was acting as a deputy sheriff, if he, Pappas, had not stated to Mr.

(Testimony of W. M. Whitney.)

Mooring at the time of the arrest, "Harry, I did not think you would do this to me," and he stated that was the conversation or remark that had been passed.

On cross-examination of W. M. WHITNEY, questioned by Mr. BROWN, he stated:

That Pappas had made some remark about picking up the corner of the tent, or there was a tent they were going to put over the whiskey.

Q. He did tell you in that conversation that he had had a conversation and had been talking with Mr. Hill and Mr. Ramage about Mr. Ferguson some days prior?

Mr. CHAVELLE.—Just a minute. I object to that. He is attempting to secure by cross-examination what the [64] Government could not get by direct-examination.

(Last question read.)

Mr. BROWN.—This goes to the gist of the defense of Mr. Pappas. If he acted in conjunction with the sheriff's office he could not be convicted here.

The COURT.—I think that the question should be answered, and the jury will not consider this as any evidence against Mr. Ferguson.

A. Yes, he made some mention of that.

Q. Did he tell you also that Sheriff Starwich had instructed Mr. Hill and Mr. Ramage to run this gang of bootleggers down?

Mr. CHAVELLE.—I object to that.

(Testimony of W. M. Whitney.)

Mr. BROWN.—It is not anything to laugh about, Mr. Whitney. You are a witness here.

The COURT.—Let him answer.

A. No, sir, he did not tell me or that Mr. Starwich had told his deputies.

Whitney, the witness, then testified, that Pappas had said "I went to Mr. Hill and Mr. Ramage, and told them that I believed I could get Ferguson, and they requested me to do it if I could."

On redirect examination, the witness, WHITNEY, testified:

That he had conversation with Mr. Ferguson on the 30th day of June, 1922. Mr. Ferguson stated that he had gone to Mr. Mooring's house in the afternoon, in his, Ferguson's machine, with Pappas to look the place over, and then he came down town and stopped at the Windsor Pool Hall, and picked up Mr. Thompson, and drove out to Magnolia, where four cases of whiskey and four or five [65] sacks of beer were thrown into his machine. He and Thompson drove back, and picked up Mr. Pappas, and drove out to Mr. Mooring's house. He stated that it was not his whiskey, and that he was transporting it to be sold and delivered to Mr. Mooring.

Mr. CHAVELLE.—I object to that answer as far as it refers to the defendant Thompson.

The COURT.—I instructed the jury yesterday, and I will again instruct them, that any statements made by any of the defendants will only be con-

(Testimony of W. M. Whitney.)

sidered as against themselves, and not against any other defendant, unless they were present when the statement was made.

Witness then testified that he had a conversation with Mr. Thompson. Mr. Thompson stated that the whiskey was not his, but that he had been picked up by Mr. Ferguson in Mr. Ferguson's car, and Mr. Ferguson had told him that he had a little job to do to go out on Queen Anne or some place, and take some liquor up to Capital Hill, and he rode out with Mr. Ferguson in the car, and the liquor was thrown in the car, and they drove down and picked up Mr. Pappas and went to Mr. Mooring's house, where they were arrested. Stated that he had known Mr. Ferguson for quite a while, and had worked with Mr. Ferguson, been his engineer on one of his boats in times previous; both Mr. Ferguson and Mr. Thompson stated the whiskey was not theirs; they had simply hauled it and delivered it out there for another party, knowing it was whiskey that had been put in the car; that they did not receive the money, and were simply to be paid for transporting it; they stated that all three rode in the front seat of the car, and the liquor was in the rear of the car. [66]

On recross-examination of W. M. WHITNEY, questioned by Mr. BROWN, witness testified:

That he had a memorandum of the license number of the car, which was 12240, that the car was a Studebaker.

(Testimony of W. M. Whitney.)

On cross-examination, questioned by Mr. CHAVELLE, the witness, W. M. WHITNEY, testified:

That Thompson had told him that he was a marine engineer by occupation and had been employed as an engineer for Mr. Ferguson, said that he simply rode out in the machine because Mr. Ferguson asked him to ride out and go along with him, and come back; they said they were hired by Mr. Pappas. At the time of the conversation with the defendants, Mr. Anderson was there, and Mr. Littlefield came in, and Mr. Mooring was there, all Federal Agents. Mr. Mooring said he never saw Thompson until he came out in the car; that Mr. Justi said Mr. Thompson was with the party.

Testimony of L. Reagan, for the Government.

L. REAGAN, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

That he is a Federal Prohibition Agent; that he saw the defendants on the 30th day of June, 1922, in the Federal Prohibition office.

Q. What did you hear Mr. Pappas say at that time?

A. Mr. Pappas claimed to be a deputy sheriff and he said he was out to catch Mr. Ferguson.

Mr. CHAVELLE.—I object to that as far as Mr. Ferguson is concerned.

The COURT.—The objection is overruled. I will state this, gentlemen, I have instructed the

(Testimony of L. Reagan.)

jury from time to time, or suggested to them on these objections, that no statements made in the absence of a defendant may be considered as against him. That [67] rule is rather broadly stated, and that in substance will still stand, but I may modify that some upon the instructions, upon this theory—well, I will not say anything further now. Proceed.

Q. Go ahead and tell what the conversation was.

A. The defendant Pappas was warned of his constitutional rights by Mr. Whitney and myself, and he claimed that he was a deputy sheriff and that he was out to get Ferguson, or find his cache, and the question was asked if he had mentioned this to the sheriff's office or to Matt Starwich, and he said he did not, and that he was trying to locate Ferguson's cache.

Witness continuing, testified: That he was present when the witness Ferguson was examined, and Ferguson said he knew nothing about this liquor, and the liquor belonged to Mr. Pappas, and he had been hired by Mr. Pappas to go out and get the liquor at Magnolia Bluff, and Mr. Thompson said he went along with Mr. Ferguson. Mr. Ferguson said he got ten dollars a case for bringing the liquor in.

On cross-examination by Mr. CHAVELLE, witness REAGAN testified as follows:

In conversation with Mr. Ferguson, Mr. Ferguson said he had nothing to do with the liquor ex-

(Testimony of L. Reagan.)

cept as a freighter. He said he was hired by Mr. Pappas to go out and get the liquor. He had so much per case; that the price was ten dollars per case; that while the liquor was packed in sacks, the common expression is twelve bottles to the case, whether they are in sacks or anything else; that the same was true as to the beer. He was to get ten dollars a case for that too. [68]

Testimony of T. W. Kline, for the Government.

T. W. KLINE, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

That he is prohibition agent and custodi*el* of all liquor. Liquor offered in evidence.

Mr. CHAVELLE.—I object to it being offered in connection with Mr. Thompson on the ground that no connection has been shown between this liquor and Mr. Thompson.

The COURT.—The objection is overruled.

Thereupon the Government rested. This was all the testimony and evidence offered by the Government on behalf of the prosecution. [69]

DEFENDANTS' CASE.

Testimony of J. C. Hill, for Defendants.

J. C. HILL, called as a witness on behalf of the defendant, Tom Pappas, being first duly sworn, testified as follows:

Direct Examination by Mr. BROWN.

That he is a deputy sheriff under Matt Starwich,

(Testimony of J. C. Hill.)

and has been working under Matt Starwich for two years; that he has been a resident of Seattle for about thirty years, and a peace officer since 1903; that he has known Mr. Pappas for the past two years; that he saw Mr. Pappas previous to the 29th day of June, 1922, at the Sheriff's office.

Q. Who was there?

A. The sheriff, Matt Starwich, and Mr. Ramage and Mr. Pappas.

Q. Did Matt Starwich give you instructions in the presence of Mr. Ramage and Mr. Pappas?

A. He wanted us to go out and see if we could not stop the bootlegging in the Ballard district, and we told him we could not get out there in our machine; that they would be gone before we got to the beach, because everybody knew we were in town, and he got us to get Mr. Pappas and Mr. Pappas took his machine out and took us out there and showed us the stuff; he had a closed car with Mr. Ramage and I. Mr. Pappas gave us the license number of Ferguson's machine. We sent Mr. Pappas out on the job, but we were in touch with each other all of the time.

Q. Did he give you any information about Mr. Ferguson?

Mr. CHAVELLE.—I object to that as being incompetent and improper.

The COURT.—The objection is sustained.

Q. Did he at any time say anything about this [70] transaction in regard to the delivery of liquor at Mooring's place?

(Testimony of J. C. Hill.)

Mr. CHAVELLE.—I object to that; that would not bind us at all.

Q. Do you remember the time of his arrest under this case? A. I do.

Q. Did you have any information as to his activities previous to that?

A. We knew what he was doing all the time.

Q. What was your knowledge as to what he was doing?

A. He was supposed to get this dope for us out there—

Mr. CHAVELLE.—I object to that and ask to have it stricken.

The COURT.—The objection is sustained to what he was supposed to be doing.

Q. What was the conversation that you had with him relative to this transaction?

Mr. CHAVELLE.—I object to that if the conversation was not in the presence of the other defendants.

The COURT.—I understood he had already stated what the directions were and the authority.

Q. Did he make a report to you afterwards?

A. Yes, sir.

Q. What was the report?

Mr. CHAVELLE.—I object to that, what report was made without the presence of my client.

The COURT.—The objection is sustained.

Q. Did you have any information previous to the arrest that this transaction was going to take place?

A. We knew that it was sooner or later to come off, because he had got their confidence. [71]

(Testimony of J. C. Hill.)

Mr. CHAVELLE.—I object to that, and ask to have the answer stricken and the jury cautioned not to regard it.

The COURT.—I think it should be stricken.

Mr. BROWN.—This goes to the question of the good faith of the defendant Pappas.

The COURT.—But there are other parties on trial here. I have permitted him to testify to the reports that were made, and the activities, but what was done as to the individuals named that would not be permissible.

Q. What reports did Mr. Pappas give to you about his activities previous to the arrest?

Mr. CHAVELLE.—That would not bind my client.

Q. Previous to the 30th of June?

Mr. CHAVELLE.—I object to that.

The COURT.—Did he make a report to you of any activities?

A. Yes, sir.

Q. What was the report?

Mr. CHAVELLE.—I object to that.

The COURT.—The report if it names individuals on trial here cannot be permitted.

Q. Omit the names, Mr. Hill, and give the report that Mr. Pappas made, previous to the 30th of June, relative to his activities upon which he had been assigned.

A. He said he was gathering information out there, and he said he would have things lined up in a little while so he would get the confidence of the people he was working on, and be able to get the information about their cache. [72]

(Testimony of J. C. Hill.)

Witness HILL then continued, and testified that Pappas said he would have things lined up in a little while so he would get the confidence of the people he was working on, and be able to get the information about their cache. That he would be able to cause the arrest of certain persons with five cases; that he was told that they did not want that, that they wanted to know where the cache was; that he said he had an engagement with certain persons in connection with some liquor, and took the telephone numbers of the witness at his home and office.

On cross-examination, the witness, questioned by Mr. CHAVELLE, testified:

That Pappas was a special deputy sheriff; that he did not draw a regular salary, and was paid for what he did. Pappas had witness Hill's and Mr. Ramage's telephone numbers, and the sheriff's office number. There was always someone in the sheriff's office. He did not call the witness up on the night he was arrested. Witness did not authorize Mr. Pappas to sell any liquor and take money for it.

On redirect examination by Mr. BROWN, witness HILL testified:

That Pappas was deputized to gain the confidence of the other parties so that he could find their cache.

On cross-examination, questioned by Mr. ALLEN, the witness testified:

On the day in question Mr. Pappas notified him

(Testimony of J. C. Hill.)

that he had been talking with these men; he was there the day before he made the deal; he was there practically every day, and probably talking with the parties nearly every day. Pappas was working out of the sheriff's office, with witness and Ramage; the sheriff told them to take Pappas out and work with him. The sheriff gave [73] them the orders. It was through the efforts of Mr. Pappas that the biggest still that was ever got in the country, was located and seized; Pappas did not have any duties at all; that he did not know the purpose of the deputy's commission that had been issued to Pappas.

Testimony of Earle Ramage, for Defendants.

EARLE RAMAGE, called as a witness on behalf of the defendant Pappas, being first duly sworn, testified as follows:

That he has lived in Seattle for about twenty-two years; that in June, 1922, he was working as a deputy sheriff under Matt Starwich, and had occasion to see Tom Pappas about that time. Mr. Pappas was in the office and the sheriff called the witness in, together with Mr. Hill, and he turned the case over to them, and told them to take care of it.

Q. And what was the conversation at that time?

A. Why, Mr. Pappas had been doing some work previous in that respect, and he called at the office to see the sheriff about this particular case, and the sheriff turned him over to Mr. Hill and myself, and told us to take care of it.

(Testimony of Earle Ramage.)

Q. What did he tell him to do?

A. He had been after this case for a considerable time and we told him to go ahead and get what he could on them.

Q. Was he to find a cache? A. Yes, sir.

Q. And was there any evidence as to the amount of liquor in the cache?

A. The evidence we had—we had several reports, and also had a report that—

Mr. CHAVELLE.—I object to that.

The COURT.—Proceed.

A. And the way the deal was to come up, he came to us, [74] I think the morning previous to the time he got in this trouble, and he said he could get five cases delivered, and I went to see the sheriff, and the sheriff said, "We do not want five cases; we want his cache," and I told Tom that, and I think he was in the office at the time, and he said, "All right," he would do that, and we were to wait for them and he was to call us up and we were to wait for him at the office and we were going up and make the arrests when the liquor was delivered to him by this man Ferguson.

Mr. CHAVELLE.—I object to that.

A. (Continued.) And from there he was to go to the cache. He was to take a load to Spokane.

Mr. CHAVELLE.—I object to that.

The COURT.—Proceed.

Q. You knew there was to be a delivery that he was mixed up in that at that time? A. I did.

Mr. ALLEN.—I object. He already testified what the conversation was, and that is enough.

(Testimony of Earle Ramage.)

Q. Was there any specific instruction that he should do anything necessary to gain the confidence of these parties?

Mr. ALLEN.—I object to that.

The COURT.—The objection is sustained.

Q. What was the conversation?

Mr. ALLEN.—I object on the ground that he has already stated it.

The COURT.—Was anything else said?

A. There was nothing else stated.

On cross-examination of witness EARLE RAMAGE, questioned by Mr. CHAVELLE, witness testified: [75]

That he has known Mr. Pappas for one year; that Pappas had his home telephone number, and also Mr. Hill's so that he could get in touch with them at any time. He was up to see witness the day previous to the time he got in trouble. He got in touch with the sheriff after he was in jail. Witness did not give Pappas any instructions to buy liquor, nor to sell any, nor to transport any, nor to take any money for the same. The deal was between the sheriff, Pappas, Hill and witness Ramage.

On cross-examination, questioned by Mr. ALLEN, witness testified:

Mr. Pappas came to see witness was either the day before, or the day he got into trouble. The first time he called witness' attention to Mr. Ferguson and Mr. Thompson, was quite a while be-

(Testimony of Earle Ramage.)

fore his arrest. He took witness out there in his machine.

Q. When was the next time he mentioned it?

A. He came up to see us every time Mr. Ferguson came to see him, he came up to tell he was getting along better with them.

Mr. CHAVELLE.—I object to that as immaterial and prejudicial to the rights of my clients.

The COURT.—It may be stricken.

The witness RAMAGE, continuing, testified that the last time he talked to Pappas was in the afternoon before his arrest. Pappas came to him in the afternoon and said he had a deal on so that he could get on to the transaction, but did not indicate anything at all.

Q. What did he say?

A. He came in and told me that he had the deal all fixed up. [76]

Mr. CHAVELLE.—Just a minute. I do not want the witness to mention the names of these defendants in that manner, because it is certainly prejudicial.

The COURT.—Do not mention the names of the parties. Proceed.

Witness then stated that Pappas had come to see him while he was in Judge Dalton's court; that he got paid for a case in which a still was seized, and also got paid on a case of a colored lady, turned over to the Police Department.

Testimony of Tom Pappas, for Defendants.

TOM PAPPAS, one of the defendants, called as a witness on his own behalf, being first duly sworn, testified as follows:

That he has resided in Seattle for thirteen years; that for three years he was in the restaurant business, and for five or six years in the taxi business, and is located at the Frye Hotel; that he has had a deputy sheriff's commission for five years.

Q. (By Mr. BROWN.) Calling your attention to this particular transaction, the date of your arrest previous thereto, did you have any conversation with the sheriff, Matt Starwich, in the presence of Mr. Hill and Mr. Ramage?

A. Yes, sir.

Q. Tell the jury what that was.

A. Well, I told Matt Starwich the case about Ferguson—

Mr. CHAVELLE.—Just a minute. I object to that as far as it affects either Mr. Ferguson or Mr. Thompson.

Mr. BROWN.—It is hard for the witness to eliminate that, and everybody knows what we are talking about.

Mr. CHAVELLE.—I object to the remark of counsel, as prejudicial, and I object to the question. [77]

The COURT.—I think I will have to cover this whole matter by the instructions to the jury when the case is finally submitted. I am inclined to think that the rule of law applicable and upon which I

(Testimony of Tom Pappas.)

would instruct the jury is that if the jury believe from all the evidence presented that there was a conspiracy confederation entered into between the defendants in this case to do the things charged in this information, that the statements made by any one of the defendants in the absence of the other defendants may be considered to determine whether they did the acts charged in the information—not that they could be found guilty of conspiracy in this case to violate the National Prohibition Act, but if the conspiracy or confederation was entered into between the parties, then a statement made by any of the parties who entered into the confederation or conspiracy to do the things charged here, could be received in evidence against all the parties who are charged here, and who participated in the actual thing. I will finally dispose of this in my instructions to the jury, as to whether any statements as I have heretofore intimated, may be received against any one of the defendants where the statement was not made in his presence, but I am simply stating this to you now so that you will all be advised just the thought that is in my mind. Proceed.

Mr. CHAVELLE.—Will the Court let the witness answer this question?

The COURT.—He can answer. [78]

Mr. CHAVELLE.—Note an exception.

(Last question read to the witness.)

Q. Go ahead and tell the conversation.

A. And Mr. Matt Starwich called Mr. Ramage and Mr. Hill in, and told them that I should go

(Testimony of Tom Pappas.)

in the other office and talk over the matter and they would give me the instructions what to do.

Q. What instructions would they give you?

A. They told me to go out and locate Ferguson's house.

Mr. CHAVELLE.—My objection goes to all of this, and I want to note an exception.

The COURT.—Yes.

A. (Continuing.) But he did not dare to take the sheriff's car but we could use one of my cars, because I had been using my car right along, and we went out and located his house.

Q. Was that at night?

A. In the afternoon, and at night they sent a boy out there from the sheriff's department, planted him out there to stay all night and watch Ferguson's movements. He did not find anything that day and in five or six—

Mr. ALLEN.—The witness should only testify as to what he knows from his personal knowledge.

The COURT.—State what you yourself did.

A. (Continuing.) And then I went to the office and they told me which way was the best way to find out, and I said, "I do not know."

Q. What were you trying to find out?

A. I was trying to find out 200 cases that Mr. Ferguson was supposed to have at Ballard Beach.

Q. And what took place?

A. And I can get five cases— [79]

The COURT.—Not the conversation, but what he did.

(Testimony of Tom Pappas.)

A. (Continuing.) And they told me to go out there and gain confidence with Ferguson.

Q. What did you do?

A. And I told Ferguson—

Q. Did you go to see Mr. Ferguson?

A. Yes, sir.

Q. When did you first see him?

A. I saw him before that. He came down there all the time.

Q. After they gave you the instructions what did you do?

A. In the meantime this Mooring came down there.

Q. Never mind about Mooring. Did you see Ferguson before you saw Mr. Mooring?

A. Yes, sir.

Q. What was that conversation?

A. I told him if there was any possible chance to get 25 cases on the other side of the mountains and he said, "Yes," and I said, "I do not believe you have that much whiskey; I would like to see where this liquor is," and he did not like to take me down there, and he went back there, and I told Mr. Hill and Mr. Ramage what I did, and they said to try to get his confidence in any way you can—

The COURT.—Do not give us so much conversation with the sheriff's office.

Q. What did you do?

A. What did I do when?

Q. After you had gone out to see Mr. Ferguson and asked if he could make a delivery of 25 cases

(Testimony of Tom Pappas.)

east of the mountains then you went back and made a report? A. Yes. [80]

Q. Then what did you do?

A. At that time this Mooring came down.

Q. Had you seen Mr. Mooring before?

A. Yes, sir.

Q. Where did you see him?

A. I saw him upstairs in the Triangle Building.

Q. Across from the Frye Hotel? A. Yes, sir.

Q. Have you an acquaintance with him?

A. Yes, sir. I met Mr. Mooring and he asked me to have a drink, and I never touched a drink in my life.

Q. When he came down to see you, what conversation did you have with him?

A. *If* asked me if I can get—

Q. Did he ask you where a certain place was, if you had been there before? A. What?

Q. Did he ask you where that bootlegging establishment was? A. Mr. Ferguson?

Q. No, Mr. Mooring.

A. Yes, the place upstairs, he knew the place himself.

Q. What did he say about this other place upstairs?

A. He used to go up there and drink all the time.

Q. Let us get down to this last time, did he say anything about it, the people had gone?

Mr. ALLEN.—I do not think that would be material.

(Testimony of Tom Pappas.)

The COURT.—Proceed.

Q. What conversation did you have with Mr. Mooring?

A. He asked if I knew any place where he could get [81] whiskey, he would like to take it to Centralia, and I said no, I was trying to think, and I said, "I know a party I can give you an introduction to that night"—

The COURT.—Who was this that was asking for whiskey to take to Centralia?

Mr. ALLEN.—Mr. Mooring.

The COURT.—Was it one of these defendants that was asking for whiskey to take to Centralia?

Mr. BROWN.—As I remember Mr. Mooring testified that he came down—

The COURT.—Oh, Mr. Mooring.

Mr. BROWN.— —and said he had negotiations with Mr. Pappas about two cases of whiskey that he wanted to take to Centralia, and I am going over that, and give his version of the conversation.

The COURT.—I do not want him to unnecessarily refer to these defendants.

Mr. BROWN.—There is nothing said about these defendants at that time.

The COURT.—Proceed.

A. (Continuing.) So Mr. Mooring asked me if I knew where he could buy two cases of whiskey to send to Centralia, and I said to him "I do not know; I know a party if I can communicate with

(Testimony of Tom Pappas.)

him to-night that you might do business with him."

Q. When was this, in the morning?

A. This was in the evening. And he said, "Can you get him now?" And I said, "I will try." And in the meantime I said, "How are you going to take the whiskey?" I wanted to know where it was at, and he said, "I have my house here; I can show you, and I have my car," and I said "I would like to see it," and he took me [82] up there and showed me his house, showed me his car, and I said, "All right, as soon as I get this fellow I will send him to you and you do business with him," and he said "I would like to do business with you."

Q. Never mind that. What did you do then?

A. I was meeting Mr. Ferguson.

Q. You tried to meet Mr. Ferguson?

A. Yes, sir.

Q. Did you eventually talk to him about this?

A. Yes, sir, to Mr. Ferguson.

Q. And what was your purpose in negotiating this transaction?

A. I thought if Mr. Ferguson went to get this whiskey for Mr. Mooring he would take me to the cache.

Mr. CHAVELLE.—Just a minute. My objection goes to all this testimony.

Mr. BROWN.—The intent with which he acted would be proper.

The COURT.—Yes, proceed.

(Testimony of Tom Pappas.)

A. (Continuing.) Well, I got Mr. Ferguson that next morning and I told him that there was a party liked to buy some whiskey, and would he like to sell them, and he said, "Yes," and I told him who the party was, that he lived at Fifteenth and John or Thomas, I do not remember exactly, and he said he would like to see him.

Q. At this time did you have a conversation or make a report to the sheriff's office about the matter?

A. Yes, sir; I told them to-morrow sometime I will meet you. I do not know what time I will meet the two fellows together. They did not know Mooring, but they knew Ferguson. I said, "As [83] soon as I make the transaction I will let you know."

Q. Where did you tell them you were going to make this transaction? A. I did not know yet.

Q. Now what did you do then?

A. Well, then, they said all right. I got the telephone numbers at the office and everything, and so I went out there with Mr. Ferguson and he said "Let us go out and see this fellow." He did not trust me very well, I guess, and he came down with his car and we went up there, and Mr. Mooring was in the back yard, and I said, "There is the fellow," and he came up and he said "Have you got the stuff," and I said, "No, not yet, but he is going to get it," and he said, "All right, I want two cases," and Mr. Ferguson pulled away, and

(Testimony of Tom Pappas.)

I thought he was going to his cache, and I was thinking—

Mr. CHAVELLE.—I object to what the witness thought.

Q. What conversation did you have with Mr. Ferguson after leaving the place for the cache?

A. He said, "We have to stop at Sixth and Pike before we go out there."

Mr. CHAVELLE.—I object as not responsive to the question, and the question is leading.

The COURT.—What conversation did you have with Mr. Ferguson, your attorney asked you?

A. That is the conversation we had. He said, "We are going out there now and we have to stop at Sixth and Pike" he said, and I said, "All right," and I said, "What are you going to do there?" and he said, "I want to get my partner; he is in the pool-room," and he got out of the machine and brings Mr. Thompson. That was the first time I ever seen Mr. Thompson. I never seen him before, and they talked it over outside the pool-room, and he said, "This [84] time we have to go there alone, and I shall make this delivery, we will go out there and get the big stuff that goes to the other side of the mountains, and then we will take you to the cache," and he said, "We will have to let you off now, and we will be back in twenty minutes and get you."

When they returned, witness Pappas testified, they drove out to Mr. Mooring's house.

Q. They went to Mr. Mooring's house?

(Testimony of Tom Pappas.)

A. Yes, sir. I got off the car and I was going to the house to call up the sheriff's department, without giving any suspicion up there.

Q. What was your purpose then?

A. To watch Mr. Mooring, when they pulled out.

Q. You were going to notify them there were two cases of whiskey there?

A. Yes, sir; and Mr. Mooring called me back, and said, "Just a minute," and he had a big tent in the grass and he said, "Get ahold of this tent," and I thought he want the tent to cover the garage some place, to get the whiskey in, and I got one end and he got the other and he pulled me close to the garage and he said, "Hold this," and before I dropped the tent down he put a bunch of money in my hand and he said, "You take this." I did not know whether it was money or what, and there was a rubber band around it, and I said, "This does not belong to me"—before I had a chance to say, "This does not belong to me," two officers came out and said, "You are under arrest."

Witness Pappas further testified that all he had to do was to bring Ferguson and Mooring together to make the transaction among themselves, and as soon as he pulled away they would get Mooring and get the cash, and go to the sheriff's department. [85]

On cross-examination, questioned by Mr. CHAVELLE, defendant PAPPAS testified:

That he was employed by the sheriff to find Mr.

(Testimony of Tom Pappas.)

Ferguson's cache, and that his transaction with Mr. Mooring was leading up to the arrest of Ferguson; that he did not introduce Mr. Mooring and Mr. Ferguson, and did not have any conversation with Mrs. Mooring previous to the arrest; that he did *not Mrs.* Mooring that he would bring out two cases of liquor. Mr. Mooring told him he wanted to take the liquor to Centralia. Pappas did not tell him how much he would charge him for it. Mooring asked what kind of stuff it was, but Pappas told him he did not know; that he had never seen Thompson before; that Mooring gave Pappas the money, that the money was found in his hand, and the minute he got the money, before he could say anything, he was under arrest. They discovered the sheriff's badge upon him. Mr. Ferguson thought Pappas was double-crossing him, and wanted to know who he was, and opened his coat, and saw the badge, and the officer said, "Is this yours?" and I said, "Yes," and explained why he was there, and the officer said, "You can explain that to Mr. Whitney."

On cross-examination, questioned by Mr. ALLEN, defendant Pappas, testified:

I told Mr. Whitney that I had talked to the sheriff about this transaction. I had talked with Matt Starwich many times before this about case. He told me the thing to do was to talk with Mr. Ramage and Mr. Hill.

Mr. Starwich knew all about the transaction, the first time I talked to him was two months before

(Testimony of Tom Pappas.)

the arrest. My brother and I own the City Taxicab and I own the Fry taxicabs.

I am not a deputy sheriff now.

I guess I will not know until after this trial whether [86] I am a deputy sheriff. I have never been notified that my commission had been revoked.

I did not tell Mr. Mooring that if he wanted any more of this stuff to telegraph me for lubricating oil. I did not tell the sheriff because I met those people and in an hour this transaction happened. I did not telephone to the sheriff's office when waiting at the Times Square, because I did not know whether they would deliver it or not. Ferguson and Thompson did not take me to the cache until after this transaction was completed, then I was supposed to get 25 cases for east of the mountains. I did not say anything to Mr. Mooring about where I was going to deliver it or that the liquor was in the back seat, or ask him what he was going to cover it up with, or that I told Mr. Mooring that the money was not enough. I did not take the rubber band off the money; I did not know how many cases were in the car and I did not count the money.

On redirect examination, questioned by Mr. BROWN, the defendant PAPPAS testified:

When I was at Mr. Mooring's house, I telephoned to Mr. Ferguson.

(Testimony of Tom Pappas.)

On direct examination, questioned by Mr. BROWN, defendant PAPPAS testified:

I have lived in Seattle for thirteen years, and have never been arrested for any offense.

The defendant Tom Pappas rests, and this is all the testimony and evidence offered on behalf of the defense of the defendant, Tom Pappas. [87]

Testimony of Charles L. Ferguson, for Defendants.

CHARLES L. FERGUSON, one of the defendants, called as a witness in his own behalf, being first duly sworn, testified as follows:

(Questioned by Mr. CHAVELLE.)

That at the present time he is employed in fixing up camping grounds at Lake Sammamish for the purpose of renting boats, and auto camping; that he is married and has three children, and has lived in Seattle since 1906; that on the 29th day of June, 1922, he had taken his wife and oldest daughter downtown to the doctor in Ballard, and came on downtown to pay his water bill, and as he drove up the street across from the courthouse, Mr. Pappas was standing there, and he threw up his hand, and said, "Hello, Harry," and defendant Ferguson said, "Hello," and Pappas said, "Will you drive me up to see a party?" Ferguson was looking for a place to park his car, and Pappas asked him if he was in much of a hurry, and he told him that he was not, and then Pappas asked if he would drive him up to see a friend of

(Testimony of Charles L. Ferguson.)

his, and Ferguson said, "Yes." Pappas said his car was not in running order. He got in the car and we drove around and I saw his car, and it looked like it had just came out of a paint-shop, and he said, "How does it look to you?" and I said, "It looks pretty good," and the wheels were jacked up and a man with a can of paint was painting the tire just above the rim, and I told him to tell me where he wanted to go, and he directed me to go up on Broadway. I do not know what the street is. There was a fellow in the yard at a place he told me to stop, whom I had never seen before. It was the same man as Mr. Mooring, witness for the Government. He and Pappas had some words. I could not overhear the conversation, and after they got through there we came on down Broadway down to Pike Street. There was a party I sold a fishing boat to and I was to meet him at the Windsor Pool Room and he was to pay me. His name was Mr. Peterson. The boat had been sold to him on time. [88] He always makes his payments at that particular place. Mr. Thompson happened to be there, and I asked him if he had seen Mr. Peterson, and he said, "No," and I asked if he would like to take a ride and he said, "Where are you going?" and I said, "Out beyond Carlton Park." He said, "I do not care if I do," and he gets in and I was headed south, and I drove out. I had known Thompson before this time, and he had done some work on the boat that I sold to Mr. Peterson.

(Testimony of Charles L. Ferguson.)

When we came to Union Street we turned down to Fourth and when we got to Fourth and Pike Mr. Pappas said to me—before we were coming down he asked if I would go out and get a couple of packages for him. I figured he was going along at that time, and I said, "Yes, I will go out and get them," and when we got to Fourth and Pike he said, "I will get out here. I want to see a party and I will wait here for you; there is no use of me going over there," and I said, "Where am I going?" and he said he would direct me. He asked if I knew where Carlton Park was and I told him I did and he said when I got there to turn to the left and drive down a block or two and I would meet a party there at the first house and they would come out and would call me, and I said, "How will I know who they are?" and he said, "I will phone and tell him your name, and he will call you," and Pappas said there was no use of his going out, and "You can pick me up when you come back," and I said, "Where will you be?" and he said, "Out about the Times Square," and I said, "All right," and I go out and these parties are standing there, and as soon as I seen the parties I stopped and he said, "Are you Mr. Ferguson?" and I said, "Yes, sir," and he said, "The fellow that Pappas sent out?" and I said, "Yes, sir," and he said, "All right," and he put the sacks in the car and I turned and came back and Pappas was standing there, and he gets in the car.

(Testimony of Chas. L. Ferguson.)

The witness testified that he was probably gone an hour and ten minutes. [89]

"When Pappas got in the car he directed me where to go, and when we got there instead of going to the side of the house— It was the same place I was before. When we got there he directed me to drive in the alley and when I got there he said "Turn here," and I turned kind of catacornered from the garage and he got out and went to the side of the car. I did not leave the car, and the next thing a fellow came up and said he was a federal officer and that I was under arrest, and one of them said to kill the engine, and the other one said, "Never mind," and he started to put me in the garage, and then he said, "No, we will take them to the house," and they took us to the house. Mooring said to Pappas to wait a minute until he got the tent, and they pulled it over toward the garage, and I did not see whether Pappas done anything or not. I knew Pappas was a commissioned deputy sheriff. I have known Pappas two years. He never called me up the night before my arrest. If he did, the phone did not ring. I was not to receive any money or compensation at all from Mr. Pappas. It was just for accommodation. I did not know what the sacks had in them. They were never removed from the car while I was in the machine. The engine was left running, and I never saw the car any more. I never had any conversation with Mr. Pappas regarding the sale of intoxicating liquor. Mr. Pap-

(Testimony of Chas. L. Ferguson.)

pas never asked me to take him out to a cache, and I did not have any cache. Mr. Thompson had nothing whatsoever to do with the matter. I only asked him to go out for a ride. I was not to receive any part of the check made payable to Pappas, or any of the money.

Q. By the way, this car is your wife's car, is it not? A. Yes, sir; it is her car.

Q. And the car was bought from a man named Hayne in March, 1922. A. Yes, sir.

Q. And the bill of sale was made out to her? [90]

A. Yes, sir; she purchased the car herself with her own money.

Q. Is this the bill of sale you received for the car? (Indicating.) A. Yes, sir.

Mr. ALLEN.—I object to that, he was driving it.

Mr. CHAVELLE.—They have charged that the defendant owned his car, your Honor.

The COURT.—The objection is sustained.

Mr. CHAVELLE.—Note an exception.

The witness FERGUSON, continuing, testified that he never possessed the intoxicating liquor offered in evidence, or any part of it, did not transport the liquor, and did not sell the liquor.

On cross-examination, questioned by Mr. BROWN, the witness FERGUSON testified:

That he has never been convicted for violation of the law; did not know how many sacks there were; said he had gone out at the direction of Mr. Pap-

(Testimony of Chas. L. Ferguson.)

pas to a place in Carlton Park, and turned to the left and went a couple of blocks, where you could see a house, but he did not see a house, but saw a couple of men who were standing on the curb. They asked if he was Mr. Ferguson and he said he was, and they said, "Are you the man Mr. Pappas sent out?" and he said, "Yes." He did not get out of the car, and did not know what was in the sacks. He had known Mr. Pappas for two years previous to the arrest. He met Mr. Pappas in front of the County-City Building, and Pappas took him to Mr. Mooring's place. Witness went as an accommodation, and did not hear any transactions and knows nothing about any booze transaction. Did not know what was in the car. [91]

On cross-examination, questioned by Mr. ALLEN, Defendant FERGUSON testified:

That Mr. Pappas did not call him up on the telephone the night previous to his arrest, and there was no liquor in the sacks so far as he knew. He did not examine them.

Q. Mr. Ferguson, did you not have a policeman arrested a short time before this for knocking you over with some liquor?

Mr. CHAVELLE.—I object to that.

Mr. ALLEN.—It is testing his credibility.

The COURT.—He may answer in view of his testimony on direct examination.

Q. You had that officer dismissed for knocking you over with sacks of liquor similar to that?

(Testimony of Chas. L. Ferguson.)

A. That has been quite a while ago.

Q. And you said a moment ago you never were arrested for a liquor violation?

A. I never have been arrested.

Mr. CHAVELLE.—He had another man arrested.

Q. Right now you are under charge in this court for other cases?

A. This is the only time I have been arrested for this.

Q. For this case? A. Yes, sir.

Q. But not for liquor?

A. I have been arrested, but never convicted.

Q. In fact, there are two other cases pending right now in which you were arrested for liquor violation? A. No, sir.

Q. In this court? A. No, sir. [92]

Mr. CHAVELLE.—I want an exception to these questions.

The COURT.—You asked if he had been arrested?

Mr. CHAVELLE.—I did not ask him if he had been arrested. I asked him if he did transport liquor.

The COURT.—You said he had never been arrested.

Mr. CHAVELLE.—Mr. Brown asked that.

The COURT.—Then the jury will disregard the last answer if I misunderstood the examination. You will disregard that answer, whether he was arrested or not, and dismiss it from your minds.

The witness, continued, further questioned by Mr. ALLEN:

(Testimony of Chas. L. Ferguson.)

That he did not know how many sacks of liquor were put in the car; did not know there were five sacks of beer and four sacks of whiskey; that he was not to get ten dollars a case for delivering them; that Pappas had asked him to go out, and Pappas himself could have gone if he wanted to; that he did not refuse Pappas permission to go along; he did not hear any conversation between Mr. Pappas and Mr. Mooring, and did not see the money pass. Did not know anything about the matter until they arrested him. He saw Mr. Mooring go and get the tent; that he had driven Mr. Pappas out to Mr. Mooring's house; Mr. Pappas said he wanted to go out and see a friend; he did not hear Mr. Pappas tell Mr. Mooring he would be back a little later with the stuff; he had known Pappas about two years.

On redirect examination, questioned by Mr. CHAVELLE, defendant FERGUSON testified:

Pappas had told witness Ferguson that he had a chance of getting out of it, and he said, "How is that, out of what?" and he said, "This trouble," and he went on telling that he could [93] pass off as a sheriff, and Ferguson said, "That has nothing to do with it; the only thing to do is to get up and tell the straight truth," and he said, "I guess that is the best thing." Pappas said he would do the right thing and go up and tell the truth.

Testimony of Oliver Thompson, for Defendants.

OLIVER THOMPSON, one of the defendants, called as a witness in his own behalf, being first duly sworn, testified as follows, on direct examination, questioned by Mr. CHAVELLE:

That he is a fisherman and has been for seven years; that he owns a fishing boat of the capacity of eight tons; that he had known Mr. Ferguson by reason of the fact that he had worked on Mr. Ferguson's boat repairing the engine. The boat was subsequently sold by Ferguson to Pete Peterson; that on the 30th day of June, 1922, he was standing in front of the barber shop by the Windsor Pool Hall, and Ferguson drove up with a car, and got out. Thompson did not know where he went to but when he came back he said, "Hello," and Thompson answered him, and he asked Thompson if he wanted to take a little ride, and Thompson said he did not mind. There was some one else in the car at the time with Mr. Ferguson, who was introduced to Mr. Thompson as a fellow named Pappas. They rode out to Carlton Park and then returned down town. The defendant Thompson did not operate the car at any time, and had nothing to do with the operation of the car, but was just a passenger or guest in the car. He did not have any interest in the transportation of the liquor in evidence, and did not know that it was being transported. He had no pecuniary interest in the transaction or in the check or money which have been offered as exhibits in this case. [94]

(Testimony of Oliver Thompson.)

On cross-examination, witness THOMPSON, questioned by Mr. ALLEN, testified:

Q. Do you remember of being in the presence of Mr. Whitney and Mr. Reagan and Mr. Mooring on June 30th, at the prohibition director's office?

A. Yes, sir.

Witness further testified that he had known Mr. Ferguson for some time, and had worked for him off and on; that he had never been convicted; that the name of his boat is the "Martha T." The boat he worked on for Mr. Ferguson was called the "Raider" and he, Ferguson, sold it to Mr. Peterson. That he had worked on another boat for Mr. Ferguson; engaged as a fisherman for seven years; he did not see any money pass to Mr. Pappas; that his hearing is defe*ction;* he did not know anything about the number of sacks of liquor; that he did not help unload any liquor; that he had not heard any conversation about the money not being sufficient to pay for the same.

On redirect examination, questioned by Mr. CHAVELLE, defendant THOMPSON stated:

That he was in the front seat of the car, and that he got out of the car when told to by one of the federal officers.

On recross-examination, defendant THOMPSON, questioned by Mr. ALLEN, stated:

That he did not know whether Mr. Pappas claimed he was a deputy sheriff. Heard no conversation about, "I did not think you would play a trick like that on me, Harry."

The defendants Charles L. Ferguson and Oliver Thompson rest. [95]

This was all the testimony and evidence offered on behalf of the defense of the defendants Thompson and Ferguson.

Thereupon the defense rested.

Thereupon the Government rested.

Motion for a directed verdict as to the defendants was made, and denied as to each of the defendants, and exception allowed.

Argument was made on behalf of the Government and on behalf of the defense, and the Court gave its instructions to the jury as follows:

Court's Instructions to Jury.

The COURT.—Gentlemen of the jury, by the indictment on file, the defendants are charged in three counts. Count 1 charges them with the possession of 46 bottles of whiskey, and 120 pints of beer; Count 2 charges them with transporting this beer and this whiskey, and Count 3 charges them with the sale of 24 bottles of whiskey, and charges that this is contrary to the National Prohibition Act.

The defendants have each pleaded not guilty; that means they deny each count. The burden is upon the Government to prove that they are guilty as charged in this indictment. They are presumed innocent until they are proven guilty beyond every reasonable doubt, and this presumption continues with them throughout the trial, and until you are convinced by the evidence that they are guilty, by the degree of proof which I have indicated.

In this case, you are instructed that it is against the National Prohibition Act for a person to possess or transport or to sell any liquid that contains an alcoholic content above one-half of one per cent of alcohol in volume, and that is fit for beverage purposes. [96]

The issues are somewhat complicated in this, that the defendants do not among themselves bear the same relations to the Government. The Government contends the defendants are all on the same basis, and that they are all responsible for the acts which are charged in the indictment, and the Government contends the proof sustains the charges.

You are instructed that from the defendants' viewpoint they are different, in this: the defendant Pappas contends he was an officer of the State, a Deputy Sheriff, appointed by the Sheriff of King County, and that he was in the discharge of his official duties in the enforcement of the laws of the State of Washington, and of the United States.

You are instructed that so far as the violation of the law here charged is concerned, or the possession of the liquids charted, the Washington law and the United States law are in harmony.

The defendant Ferguson contends that he had nothing to do with the matter, and the defendant Pappas said he did arrange with the witness Mooring to sell the whiskey and to do this from a supply which Ferguson had, and you heard the testimony with relation to the transaction between the parties; and he said he arranged for the transportation of this whiskey with Ferguson, to be

delivered over to Mooring, and agrees with the witnesses on the part of the Government with relation to the transportation, excepting that he had nothing to do himself with the transportation, other than as acting as an intermediary between Mooring and Ferguson. He denies that the money and the check which the Government's witnesses have sworn they paid to him, and which has been admitted in evidence in this case, was delivered to him, other than as you heard in his testimony, that it was handed to him when they said, "This is yours," and he said, "It does not belong to me," and that he did not have it voluntarily. [97]

And the defendant Ferguson contends, briefly, that he was engaged by the defendant Pappas to transport some packages from this place on Magnolia Bluff to the place where it was finally found and where the parties were arrested, and that he did not know what they were.

And the defendant Thompson contends he was merely a spectator, who accompanied the defendant Ferguson upon the trip; so from these different viewpoints, the defendants occupy different relations.

You are instructed that, as a matter of law, if the defendant Thompson was an innocent spectator on this trip, and merely a passenger, or guest—passenger upon Ferguson's car, or a guest of Ferguson, accompanying him upon this trip, innocent of the purpose or the motives of the trip, and had nothing to do with it whatever, then the defendant Thompson would not be guilty, because he did not have guilty knowledge of anything that transpired.

You are instructed that if the defendant Ferguson went out there to get some packages, he not knowing what the packages were, and not knowing what the packages were placed into the car for, and hauled this whiskey from the place where it was loaded into the car to the place where it was found, he not then knowing what it was, then the defendant Ferguson would not be guilty.

And you are instructed that if the defendant Pappas was acting in his official relation, and had nothing to do with this transaction, other than to bring Mooring and Ferguson together so they could conclude the relation of purchaser and seller, and had nothing further to do with that, then the defendant Pappas, if he were acting in good faith, would not be guilty of the violation of the law.

You are instructed, however, gentlemen of the jury, that the fact that the defendant Pappas was a Deputy Sheriff would not [98] excuse him from violating this law; would not excuse him from arranging with any person for the purchase and sale of this whiskey and this commodity, if he was acting independently of his official relation, and did not do that in his official capacity, and it would not excuse him from perfecting a sale of the whiskey charged in this indictment, if he did effect a sale. It would not excuse anybody, no official relation, I do not care what it is. The Governor of the State could not go out and arrange with another person to sell some whiskey and sell the whiskey to him in violation of this act, nor could the sheriff of this county do it. No person could do that.

So, in this case, it is for you to determine what relation these defendants had to this transaction, and what the facts were.

If the defendant Pappas, as testified to by the witnesses on the part of the Government, arranged with the witness Mooring to sell him some whiskey, and he arranged with Mr. Ferguson to bring the whiskey to the place where it was to be delivered to Mr. Mooring, and at the place where it was to be delivered, and Mr. Mooring paid to him the money and the check, as testified to in this case, then the defendant Pappas would be guilty of the sale of this whiskey, and if he arranged with Ferguson to haul this whiskey, to transport it, from the place where it was to the place where the relations were consummated, whatever they were, then he would be guilty of transporting, as well as of sale, and if he had this whiskey in his possession at the place where the negotiations were consummated, whatever the negotiations were, you may find were had, then he would be guilty of possession of whiskey likewise.

And you are instructed that you are the sole judges of the facts in the case, and you must determine what the facts are. You are likewise the sole judges of the credibility of the witnesses [99] who have testified before you in this case, and in determining the weight or the credit you will attach to the testimony of any witness, you will take into consideration his demeanor on the stand, the reasonableness of the story, the interest or the lack of interest in the result of this controversy, the opportunity of the witness for knowing the things about

which he has testified. Take into consideration every element which you feel bears on the credibility of the witnesses, and apply to each witness the same test you would apply to him in the ordinary affairs of life, when his truthfulness or falsity might be under consideration by you.

The defendants in this case are each interested, because if they are convicted they must be punished. Did they, therefore, because of this interest, so relate their statements before you as to the facts as they concede them to be, so as to exonerate themselves from any liability with relation to the charges involved here? Did their story impress you as true? Did the relations, as testified to by the defendant Pappas, and by the witnesses Hill and Ramage, impress you as reasonable, in view of the arrangements covered by the testimony and what was done and what transpired? If the defendant Pappas was innocent in locating a cache of—a quantity of whiskey, and believed, as he testified, that the defendant Ferguson had such a cache, then would he have taken some steps, when he had arranged with the defendant Ferguson to get some whiskey or some of the cache, to place the entire trip under surveillance and arrange with Hill and Ramage that some person should be—should trail him, if he did not himself want to make such an arrangement, as would bring about some consummation of that purpose, instead of waiting, as he said, for such a length of time as he was afraid he would not come back? Was that reasonable for a public official to do such a thing? [100]

These are all elements to be taken into consideration by you. And again, when the individual knew the transaction was being carried forward to consummation, is it reasonable to assume he would have carried it forward himself without getting in touch with others, as disclosed in this case, without getting in touch with the officials with whom he was co-operating, for the purpose of having the cache found and discovered, when the parties went to it, as he had arranged should be done.

Bring to bear upon every phase of the testimony in this case the circumstances which the testimony has disclosed, and every fact which is either conceded or which the circumstances will warrant in your judgment.

With relation to the defendant Ferguson, he has testified before you—well, you will remember his testimony—with relation to the transactions, in response to questions propounded by his counsel and by Government counsel and on the part of counsel for defendant Pappas, and you will determine whether a man of his experience, and one engaged in the business in which he is, whether it would be possible for the number of sacks of bottles to be placed into an automobile in which he was sitting, in the front seat, and he haul that from the place where it had been taken from, to the place where it was finally apprehended, and not know what it was. He said he did not know what it was. Does that impress you as being a truthful statement? Taking into consideration all the circumstances which have been disclosed here, it is for you

to determine what weight should be given to that statement, and to his entire testimony in the case.

Then take the witness Thompson. Does his testimony ring true? Is there anything in his testimony which would place after his statement an interrogation point, or make you feel no credence [101] could be placed upon it? or which makes you feel there are no facts upon which to predicate the statement he made?

On the other hand, take the witnesses for the Government. They are sworn officers of the Government. Is there anything that would show prejudice or bias on their part against the defendants? That they would go upon the stand and testify to anything that is not true?

As a matter of fact, there is not much dispute between the witnesses on the part of the Government, and upon the part of the defendants. The dispute is among themselves, and you will, therefore, gentlemen of the jury, weigh this testimony fairly, and consider where the truth in this case lies.

Another element in this case: In the examination of the witnesses, the witnesses were permitted to make statements with relation to conduct of a defendant in the absence of the defendant.

You are instructed, as a matter of law, any statement made by a defendant himself is always admitted, but a statement made in the absence of a person, so that he did not have an opportunity to contradict or to deny it, is not, as a general rule of law, admitted; and at the inception of the trial, when the first objection was made, I limited the answer to the defendant who had made the state-

ment. As the trial developed, I observed to counsel, so they would be advised, that possibly a statement under the circumstances, might be taken here in this sort of a case, against a party, when made in his absence, and you are instructed, gentlemen of the jury, that if you believe in this case that the defendant Pappas and the defendant Ferguson, entered into a conspiracy or confederation, and including the defendant Thompson, if the testimony warrants it, but if they entered into a conspiracy or confederation for the purpose of having transported and sold this whiskey charged in [102] this indictment, then you are instructed that a statement made by either of the parties in the absence of the other party would be admissible in evidence in this trial against such other party, the theory being that if the parties entered into a conspiracy or confederation, then each party entering into that conspiracy or confederation, constituted the other party his agent for the purpose of carrying forward the particular thing that they had conspired to do, and when a person constitutes another his agent to do a particular thing, then he is bound by what the person does or says, in carrying out that particular thing.

So, in this case if you believe that the defendant Pappas, and the defendant Ferguson entered into a conspiracy, whether the defendant Thompson was a part of that conspiracy or not, then believing that to be established in your mind, you would have a right to consider a statement made by

either of the defendants in the absence of the other, testified to in this case.

But, if such conspiracy or confederation has not been established, then you may not consider a statement testified to as made here in the absence of such defendant, against that defendant, but it can only be considered against the person who made it.

In this case, gentlemen of the jury, I have referred to the matter of reasonable doubt. You are instructed that a reasonable doubt is just such a doubt as the term implies. It is a doubt for which you can give a reason. A juror is satisfied beyond a reasonable doubt when he is convinced to a moral certainty of the guilt of the party charged. It is not a speculative, imaginary or conjectural doubt. It is a doubt which is created by the want of evidence or it may be created by the evidence itself. It is such a doubt as a man of ordinary prudence, sensibility and decision, in the determination of an issue of like concern to himself as that [103] before the jury is to the defendant, as would make him pause or hesitate in arriving at a conclusion.

In this case, you will consider this case fairly and conclude it from the evidence as you have heard it, and as it has been developed and disclosed by the witnesses upon the stand.

If you believe in this case any witness has wilfully testified falsely concerning any material fact in this case, you have the right to disregard the testimony of such witness entirely, except in so

far as it may be corroborated by other credible evidence or circumstances detailed or developed upon the trial of this cause.

You will give the defendants a square deal, and you will give the Government a square deal, bearing in mind that we cannot have government unless we have law enforcement, and Courts are the tribunals in which such issues are determined.

Judge and juries and lawyers perform different functions in the trial of a case. The lawyers are to place before you the facts so far as they know them from their viewpoint; the judge to see that the trial is orderly conducted and immaterial matter excluded, and to advise the jury on the law, what the law is with relation to the issues. The jury are the sole judges of the facts and of the credibility of the witnesses.

If I have referred to any fact in this case, I want you to disregard it, as I do not care to invade the province of the jury, and it has been done simply to illustrate some proposition of law involved with the facts, and you will decide this case from the facts and the evidence and circumstances developed and detailed upon the trial of the case.

You have a right to consider any circumstance that has been disclosed, bearing upon this issue. Circumstantial evidence [104] is legal and competent and proper for your consideration, and when it is of such a character as to exclude every reasonable hypothesis except that of the guilt of the defendant, and inconsistent with every other hypothesis except that of the innocence of the

defendant, then the circumstance will be sufficient for conviction.

It will require your entire number to agree upon a verdict. You can find either of the defendants guilty upon all three counts, or you can find either of the defendants guilty of one count, and not guilty of the other two counts, or you can find either of the defendants guilty on two of the counts and not guilty on the other count, or you can find either of the defendants not guilty on all three counts. You will fill in the verdicts which will be furnished you in your jury-room, filling in the blank form "is" or "is not" guilty, as you may find as to each of the defendants, on the several counts.

The information is not evidence, but is sent to the jury-room for your use to determine what the charge is. Have I covered the case, and are there any exceptions?

Mr. BROWN.—You said there was no dispute between the Government and the defendant Pappas as to the money transaction.

The COURT.—I did not say that. I said upon the money transaction the defendant denies that.

Mr. BROWN.—There is a dispute between the Government witnesses and the defendant Pappas as to just how that money was paid.

The COURT.—Let me cover that. The undisputed fact is with relation to the transportation of the whiskey, and you are instructed that it is an undisputed fact that the whiskey contains above the amount of alcoholic content allowed by law,

and that it is fit for beverage purposes. Every other fact is in dispute, and [105] you will have to determine from the evidence what the facts are. There is no dispute about the transportation, of course, but there is a dispute as to the knowledge of the defendant Ferguson, he denies that he knew what it was, but all the other elements are in dispute, and you will determine this all from the evidence that has been presented.

Mr. ALLEN.—Do you think it is proper to instruct upon the law of aiding and abetting.

The COURT.—No, that is not in the case.

Mr. ALLEN.—There might be some confusion about the purchase and sale.

The COURT.—No, no. If there is nothing else you may retire to the jury-room and consider your verdict. It will require your entire number to agree upon a verdict, and when you have agreed you will cause to be returned into court your verdicts, which must be signed by your foreman whom you will select when you have retired.

Mr. CHAVELLE.—Will your Honor let the record show our exception to this charge.

The COURT.—No, I cannot. I asked if there were any exceptions. Wait, gentlemen of the jury. Exceptions have to be taken before the jury retire.

Mr. BROWN.—The only exception I suggested has been covered.

The COURT.—Yes.

Mr. CHAVELLE.—I take exception to the instructions of the Court relating to conspiracy. I

contend there is no evidence of any such an agreement.

The COURT.—Very well. You may retire, gentlemen of the jury. [106]

The jury then retired, and after deliberation returned a verdict of guilty as charged, under all three counts.

Thereafter, the defendants Pappas, Charles L. Ferguson and Oliver Thompson, gave notice of intention to ask for a new trial and for arrest of judgment.

Thereupon, within the time allowed, before sentence was imposed, the defendants moved for a new trial upon the following grounds:

1. Insufficiency of the evidence to justify the verdict.

2. Said verdict was against, and contrary to the evidence.

3. Said verdict was against, and contrary to law.

4. Errors of law occurring during the trial, and excepted to at the time by the attorney for the defendants.

Defendants Pappas, Ferguson and Thompson at the same time moved for arrest of judgment, upon the following ground:

That Counts I, II, and III of the indictment herein had no force or effect, in the above-entitled cause, and are contrary to the law.

Thereupon, the Court denied each of said motions. The Government moved for judgment and sentence and the Court then entered judgment and sentence as follows:

That the defendant Tom Pappas be confined in the King County Jail for six months, and pay a fine of Five Hundred Dollars;

That the defendant, Charles L. Ferguson, be confined in the King County Jail for six months, and pay a fine of five hundred dollars;

That the defendant, Oliver Thompson, be confined in the King County Jail for a period of ninety days.

And now, in furtherance of justice, and that right may be done the defendants, Pappas, Ferguson and Thompson, said defendants pray that this, their bill of exceptions, may be settled, allowed, [107] signed and sealed by the Court, and made a part of the record.

EDWARD H. CHAVELLE,
Attorney for Defendants, Ferguson and Thompson.

FRED C. BROWN,
Atty. for Tom Pappas.

Order Settling Bill of Exceptions.

Now, on this 23d day of February, 1923, the above cause came on for hearing on the application of the defendants Charles L. Ferguson and Oliver Thompson and Tom Pappas to settle the bill of exceptions in this cause. Counsel for both parties appeared, and it further appearing to the Court that the time within which to settle and file the bill of exception in the foregoing cause has been duly extended, and that said bill as heretofore lodged with the clerk is duly and seasonably presented for settlement and allowance, and it

further appearing that said bill of exception contains all of the material facts occurring upon the trial of the cause, together with the exceptions thereto, and all of the material matters and things occurring upon the trial, except the exhibits introduced in evidence which are hereby made part of said bill of exceptions by reference and incorporation; and the Court being duly advised, it is by the Court

ORDERED, that said bill of exceptions be and it hereby is settled as a true bill of exceptions in said cause, which contains all of the material facts, matters, things, and exceptions thereto occurring upon the trial of said cause and not of record heretofore, and the same is hereby certified accordingly by the undersigned Judge of this Court, who presided at the trial of said cause, as a true, full and correct bill of exceptions, and the Clerk of the court is hereby ordered to file the same as a record in [108] said cause and transmit the same to the Honorable Circuit Court of Appeals for the Ninth Circuit.

JEREMIAH NETERER,
United States District Judge.

Received bill of exceptions this 15th day of Feb. 1923.

THOS. P. REVELLE,
BK.
U. S. Atty.

[Indorsed]: Lodged in the United States District Court, Western District of Washington, Northern Division. Feb. 15, 1923, and Filed Feb.

23, 1923, as Settled. F. H. Harshberger, Clerk. By S. E. Leitch, Deputy. [109]

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 7069.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

TOM PAPPAS, CHARLES FERGUSON and OLIVER THOMPSON,

Defendants.

Order Extending Time to and Including April 16, 1923, to File Record and Docket Cause.

For good cause now shown, it is ORDERED, that the time for filing the record in the above-entitled cause in the office of the Clerk of the above-entitled court, be and the same is hereby extended to the 16th day of April, 1923.

Done in open court this 27th day of March, 1923.

EDWARD E. CUSHMAN,

Judge.

O. K.—DeWOLFE EMORY,

Asst. U. S. Atty.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. March 27, 1923. F. M.

Harshberger, Clerk. By S. E. Leitch, Deputy. [110]

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 7069.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

TOM PAPPAS, CHARLES L. FERGUSON and OLIVER THOMPSON,

Defendants.

Praecipe for Transcript of Record.

To the Clerk of the Above-entitled Court:

You will please prepare copies of the following documents and papers in the above cause, and forward them under your certificate and seal to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, as a transcript of record in said cause, viz.:

1. Indictment.
2. Arraignment.
3. Plea*d* of not guilty.
4. Record of days trial and journal entry of order empaneling jury.
5. Verdict of guilty.
6. Motion in arrest of judgment.
7. Motion for new trial.
8. Order denying motion for new trial, and in arrest of judgment (journal entry).

9. Sentence and judgment of Court.
10. Petition for writ of error.
11. Assignment of errors.
12. Order allowing writ of error.
13. Writ of error with order attached. [111]
14. Citation in error.
15. Bond on writ of error.
16. Order extending time and return day for appellate record, to February 15, 1923.
17. Order extending time for filing record until March 15, 1923.
18. Bill of exceptions with allowance and endorsements thereon.
19. Order settling and allowing bill of exceptions.
20. Praecipe for appellate record.
21. Clerk's certificate.

EDWARD H. CHAVELLE,
Attorney for Defendants Charles L. Ferguson and Oliver Thompson.

FRED C. BROWN,
Atty. for Tom Pappas.

I waive the provisions of the act approved February 13, 1911, and direct that you forward typewritten transcript to the Circuit Court of Appeals for printing as provided under rule 105 of this Court.

EDWARD H. CHAVELLE,
Attorney for Defendants Charles L. Ferguson and Oliver Thompson.

FRED C. BROWN,
Atty. for Tom Pappas.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Feb. 27, 1923. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [112]

In the United States District Court for the Western District of Washington, Northern Division.

No. 7069.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

TOM PAPPAS, CHARLES L. FERGUSON, and OLIVER THOMPSON,

Defendants.

Certificate of Clerk U. S. District Court to Transcript of Record.

United States of America,
Western District of Washington,—ss.

I, F. M. Harshberger, Clerk of the United States District Court for the Western District of Washington, do hereby certify this typewritten transcript of record, consisting of pages numbered from 1 to 112, inclusive, to be a full, true, correct and complete copy of so much of the record, papers, and other proceedings in the above and foregoing entitled cause, as is required by praecipe of counsel filed and shown herein, as the same remain of record and on file in the office of the

Clerk of said District Court, and that the same constitute the record on return to writ of error herein, from the judgment of said United States District Court for the Western District of Washington to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify the following to be a full, true and correct statement of all expenses, costs, fees and charges incurred and paid in my office by or on behalf of the plaintiffs in error for making record, certificate or return to the United States Circuit Court of Appeals for the Ninth Circuit in the above-entitled cause, to wit:

Clerk's fees (Sec. 828, R. S. U. S.) for making record, certificate or return—287 folios at 15¢	$43.05
[113]	
Clerk's certificate to transcript of record, 4 folios at 15¢	.60
Seal to said certificate	.20

I hereby certify that the above cost for preparing and certifying record, amounting to $43.85, has been paid to me by attorneys for plaintiffs in error.

I further certify that I hereto attach and herewith transmit the original writs of error and the original citations issued in this cause.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court,

at Seattle, in said District, this 12th day of April, 1923.

[Seal] F. M. HARSHBERGER,
Clerk United States District Court, Western District of Washington. [114]

In the United States Circuit Court of Appeals, Ninth Circuit.

No. 7069.

TOM PAPPAS et al.,
Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,
Defendant in Error.

Writ of Error.

United States of America,
Ninth Judicial Circuit,—ss.

The President of the United States of America:
To the Honorable Judge of the District Court of the United States for the Western District of Washington, Northern Division:

Because in the record and proceedings, as also in the rendition of judgment, of a plea which is in the said District Court before you, between the United States of America, as plaintiff, and Tom Pappas as defendant, a manifest error hath happened, to the great damage of the said defendant, Tom Pappas, as by his complaint appears, and we being willing that error, if any hath been, should be corrected, and full and speedy justice done to the parties aforesaid

in this behalf, do command you, if judgment be therein given, that under your seal, you send the record and proceedings aforesaid, with all things concerning the same to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at the city of San Francisco, in the state of California, where said Court is sitting, within thirty days from the date hereof in the said Circuit Court of Appeals to be then and there held, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done. [115]

WITNESS, the Honorable WILLIAM HOWARD TAFT, Chief Justice of the United States of America, this 2d day of January, 1923.

[Seal] F. M. HARSHBERGER,
Clerk of the United States District Court for the Western District of Washington, Northern Division.

Copy rec'd Jan. 4, 1923.

THOS. P. REVELLE,
Atty. Deft. in Error.

Filed in the United States District Court, Western District of Washington, Northern Division. Jan. 2, 1923. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [116]

United States Circuit Court of Appeals for the Ninth Circuit.

No. 7069.

O. THOMPSON and C. FERGUSON,
Plaintiffs in Error,

vs.

UNITED STATES OF AMERICA,
Defendant in Error,

Writ of Error.

To the Honorable Judges of the District Court for the Western District of Washington, Northern Division, GREETING:

Because, in the record and proceedings, as also in the rendition of the judgment in the District Court before the Honorable Jeremiah Neterer, between O. Thompson and C. Ferguson, plaintiffs in error, and United States of America, defendant in error, a manifest error hath happened, to the great damage of the said O. Thompson and C. Ferguson, plaintiffs in error, as by their complaint appears.

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the party aforesaid in this behalf, DO COMMAND YOU, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, within thirty days from the date hereof, to be then and there held, that the

record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done. [117]

WITNESS, the Honorable WILLIAM HOWARD TAFT, Chief Justice of the Supreme Court of the United States, the 28th day of December, 1922.

[Seal] F. M. HARSHBERGER,
Clerk of the United States District Court for the Western District of Washington, Northern Division.

Service of within writ of error and receipt of a copy thereof, is hereby admitted, this 28th day of December, 1922.

THOS. P. REVELLE,
Attorney for Defendant in Error.

Filed in the United States District Court, Western District of Washington, Northern Division. Dec. 28, 1922. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [118]

In the District Court of the United States for the Western District of Washington, Northern Division.

IN ADMIRALTY—No. 7069.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

TOM PAPPAS et al.,
Defendants.

Citation on Writ of Error.

United States of America,—ss.

The President of the United States of America, to the United States of America, and to THOMAS P. REVELLE, United States Attorney for the Western District of Washington, Northern Division, GREETING:

You are hereby cited and admonished to be and appear before the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, in the State of California, within thirty days from date hereof, pursuant to a writ of error filed in the Clerk's office of the District Court of the United States, for the Western District of Washington, Northern Division, wherein said Tom Pappas is plaintiff in error, and the United States of America is defendant in error, to show cause, if any there be, why judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the party in that behalf.

WITNESS, the Honorable EDWARD E. CUSHMAN, Judge of the District Court of the United States for the Western District of Washington, Northern Division, this 2d day of January, 1923.

EDWARD E. CUSHMAN,
United States District Judge.

[Seal] Attest: F. M. HARSHBERGER,
Clerk, United States District Court.

Received copy, Jan. 2, 1923.

THOS. P. REVELLE,
Atty. for Pltff.

Filed in the United States District Court, Western District of Washington, Northern Division. Jan. 2, 1923. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [119]

In the District Court of the United States for the Western District of Washington, Northern Division.

IN ADMIRALTY—No. 7069.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

TOM PAPPAS, OLIVER THOMPSON, and CHARLES H. FERGUSON,

Defendants.

Citation on Writ of Error.

United States of America,—ss.

The President of the United States of America, to the United States of America, and to THOMAS P. REVELLE, United States Attorney for the Western District of Washington, Northern Division, GREETING:

You are hereby cited and admonished to be and appear before the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, in the State of California, within thirty days from date hereof, pursuant to a writ of error filed in the Clerk's office of the District Court of the United States, for the Western District of Washington, Northern Division, wherein said Charles H. Fergu-

son is plaintiff in error, and the United States of America is defendant in error, to show cause, if any there be, why judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the party in that behalf.

WITNESS, the Honorable JEREMIAH NETERER, Judge of the District Court of the United States for the Western District of Washington, Northern Division, this 28th day of December, 1922.

JEREMIAH NETERER,
United States District Judge.

[Seal] Attest: F. M. HARSHBERGER,
Clerk, United States District Court.

Received a copy of the within citation this 28 day of Dec., 1922.

THOS. P. REVELLE,
Attorney for Plff.

Filed in the United States District Court, Western District of Washington, Northern Division. Dec. 28, 1922. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [120]

In the District Court of the United States for the Western District of Washington, Northern Division.

IN ADMIRALTY—No. 7069.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

TOM PAPPAS, OLIVER THOMPSON, and CHARLES H. FERGUSON,
Defendants.

Citation on Writ of Error.

United States of America,—ss.

The President of the United States of America, to the United States of America, and to THOMAS P. REVELLE, United States Attorney for the Western District of Washington, Northern Division, GREETING:

You are hereby cited and admonished to be and appear before the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, in the State of California, within thirty days from date hereof, pursuant to a writ of error filed in the Clerk's office of the District Court of the United States for the Western District of Washington, Northern Division, wherein said Oliver Thompson is plaintiff in error, and the United States of America is defendant in error, to show cause, if any there be, why judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the party in that behalf.

WITNESS the Honorable JEREMIAH NETERER, Judge of the District Court of the United States for the Western District of Washington, Northern Division, this 28th day of December, 1922.

JEREMIAH NETERER,
United States District Judge.

[Seal] Attest: F. M. HARSHBERGER,
Clerk, U. S. Court.

Received a copy of the within citation this 28 day of Dec., 1922.

THOMAS P. REVELLE,
Attorney for Plaintiff.

Filed in the United States District Court, Western District of Washington, Northern Division. Dec. 28, 1922. F. M. Harshberger, Clerk. By ————, Deputy. [121]

[Endorsed]: No. 4037. United States Circuit Court of Appeals for the Ninth Circuit. Tom Pappas, Charles H. Ferguson and Oliver Thompson, Plaintiffs in Error, vs. The United States of America, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court for the Western District of Washington, Northern Division.

Received April 16, 1923.

F. D. MONCKTON,
Clerk.

Filed May 21, 1923.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

No. 4037

In The United States
Circuit Court of Appeals
For the Ninth Circuit

TOM PAPPAS, CHARLES H. FERGUSON and OLIVER THOMPSON,

Plaintiffs in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

UPON WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGON, NORTHERN DIVISION.

HONORABLE JEREMIAH NETERER, *Judge.*

BRIEF OF CHARLES H. FERGUSON AND OLIVER THOMPSON, PLAINTIFFS IN ERROR.

EDWARD H. CHAVELLE,
Attorney for Plaintiffs in Error.

315-321 Lyon Building,
Seattle, Washington.

Gateway Printing Co.

FILED
SEP - 7 1933
F. D. Monckton

In The United States
Circuit Court of Appeals
For the Ninth Circuit

TOM PAPPAS, CHARLES H. FERGUSON and OLIVER THOMPSON,

Plaintiffs in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

UPON WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGON, NORTHERN DIVISION.

HONORABLE JEREMIAH NETERER, *Judge.*

BRIEF OF CHARLES H. FERGUSON AND OLIVER THOMPSON, PLAINTIFFS IN ERROR.

STATEMENT OF THE CASE.

An information was filed in this case charging plaintiffs in error, Charles H. Ferguson and Oliver Thompson, together with another plaintiff in error,

named therein, in three counts, with the possession, transportation and sale of intoxicating liquor, in violation of an Act of Congress passed October 28, 1919, known as the National Prohibition Act. This information was filed in the United States District Court of the Western District of Washington, Northern Division, on the 29th day of September, 1922. Plaintiffs in error were arraigned and entered a plea of not guilty, and were placed on trial (Tr. pp. 6-10).

At the conclusion of the trial the jury returned a verdict of guilty as charged in counts one, two and three of the information, as to all of the plaintiffs in error; and after motions in arrest of judgment and for a new trial were duly interposed and denied, plaintiffs in error were sentenced to serve a term of six months in the county jail and to pay a fine of $500, as to Charles H. Ferguson, and ninety days in the county jail as to Oliver Thompson (Tr. pp. 11-20).

The evidence of the Government tended to establish that on the 28th day of June, 1922, the defendant, Tom Pappas, a deputy sheriff in the employ of the sheriff of King County, entered into an arrangement to deliver to one Mooring, a Federal prohibition agent, intoxicating liquor, under an arrangement that if Mooring would wire the plaintiff in error, appas, for so much lubricating oil he would send him common stuff, and if he wanted the bonded stuff to say,

"high grade lubricating oil" (referring by "stuff" to intoxicating liquor). Thereafter, in a conversation with the Government witness, Mooring, the plaintiff in error, Pappas, said:

> "I have to hire a car to get this stuff. My own car is broken down and they will not get it fixed in time."

That was about twelve o'clock on the 30th day of June, 1922, and about four o'clock on the same day, the plaintiff in error, Pappas, in accordance with the arrangement with the Government agent Mooring, delivered two sacks. Mooring said, "What did you get " and Pappas said "Pebble Ford, what you ordered." There were some other sacks in the car and Mooring said, "What are the others?" and Pappas said, "I will deliver them further on." Then Pappas said, "What are you going to cover them up with?" Mooring said, "This tent," and he pulled the tent over to the garage door. Mooring said, "While you count the money out I will get the stuff out," and handed him the money a few feet outside the garage and walked into the garage on the side of his car. (Tr. pp. 56, 57).

The Government agent testified that all of the transactions were had with Pappas (Tr. pp. 58, 64, 653. The witness, Mooring, who carried out all of the negotiations leading up to the consummation of the completed transaction between Pappas and Mooring, in no way implicated the plaintiffs in error, Ferguson and Thompson (Tr. pp. 54-59).

None of the Government witnesses implicated the said plaintiffs in error Thompson and Ferguson, until the witness, Max Anderson, was called on behalf of the Government, and testified that after his arrest plaintiff in error, Pappas, said he was a deputy sheriff and had been working on Ferguson and Thompson for some time to get them.

MR. CHAVELLE: I object to that.

THE COURT: The objection is sustained.

MR. BROWN: I think it is admissible as conversation between the parties.

THE COURT: Propound the question again. (Last question read).

THE COURT: He may answer.

MR. CHAVELLE: Exception.

Mr. Pappas said he was a deputy sheriff, and had been working on Ferguson and Thompson for some time to land them for selling liquor (Tr. pp. 63, 64, 65).

The Government called L. Reagan, Federal prohibition agent, stationed at Seattle, who testified that after the arrest of the plaintiffs in error they were examined separately.

Q. What did you hear Mr. Pappas say at that time?

A. Mr. Pappas claimed to be a deputy sheriff and he said he was out to catch Mr. Ferguson.

MR. CHAVELLE: I object to that as far as Mr. Ferguson is concerned.

THE COURT: The objection is overruled. I will state this, gentlemen, I have instructed the jury from time to time, or suggested to them on these objections, that no statements made in the absence of a defendant may be considered as against him. That rule is rather broadly stated, and that in substance will still stand, but I may modify that some upon the instructions, upon this theory—well, I will not say anything further now. Proceed.

Q. Go ahead and tell what the conversation was.

A. The defendant Pappas was warned of his constitutional rights by Mr. Whitney and myself, and he claimed that he was a deputy sheriff and that he was out to get Ferguson, or find his cache, and the question was asked if he had mentioned this to the sheriff's office or to Matt Starwich, and he said he did not, and that he was trying to locate Ferguson's cache (Tr. pp. 74, 75).

During the examination of J. C. Hill, called as a witness on behalf of the plaintiff in error, Tom Pappas, the Court repeatedly sustained the objection of counsel for plaintiffs in error, Ferguson and Thompson as to the testimony of alleged reports made by the plaintiff in error, Tom Pappas, to the witness, J. C. Hill, a deputy sheriff, which referred to the plaintiffs in error, Ferguson and Thompson; but when Earl Ramage, a deputy sheriff in the employ of the sheriff of King County, was called as a witness for the said Tom Pappas the Court

admitted the same evidence which he had previously found objectionable.

Q. And was there any evidence as to the amount of liquor in the cache?

A. The evidence we had—we had several reports, and also had a report that—

MR. CHAVELLE: I object to that.

THE COURT: Proceed.

A. And the way the deal was to come up, he came to us, I think the morning previous to the time he got in this trouble, and he said he could get five cases delivered, and I went to see the sheriff, and the sheriff said, "We do not want five cases; we want his cache," and I told Tom that, and I think he was in the office at the time, and he said, "All right," he would do that, and we were to wait for them and he was to call us up and we were to wait for him at the office and we were going up and make the arrests when the liquor was delivered to him by this man Ferguson.

MR. CHAVELLE: I object to that.

A. (Continued). And from there he was to go to the cache. He was to take a load to Spokane.

MR. CHAVELLE: I object to that.

THE COURT: Proceed.

Q. You knew there was to be a delivery that he was mixed up in at that time

A. I did. (Tr. p. 82).

The plaintiff in error, Tom Pappas, was then called as a witness on his own behalf.

Q. Tell the jury what that was.

A. Well, I told Matt Starwich the case about Ferguson.

MR. CHAVELLE: Just a minute. I object to that as far as it affects either Mr. Ferguson or Mr. Thompson.

THE COURT: I think I will have to cover this whole matter by the instructions to the jury when the case is finally submitted. I am inclined to think that the rule of law applicable and upon which I would instruct the jury is that if the jury believe from all the evidence presented that there was a conspiracy confederation entered into between the defendants in this case to do the things charged in this information, that the statements made by any one of the defendants in the absence of the other defendants may be considered to determine whether they did the acts charged in the information—not that they could be found guilty of conspiracy in this case to violate the National Prohibition Act, but if the conspiracy or confederation was entered into between the parties, then a statement made by any of the parties who entered into the confederation or conspiracy to do the things charged here, could be received in evidence against all the parties who are charged here, and who participated in the actual thing. I will finally dispose of this in my instructions to the jury, as to whether

any statements as I have heretofore intimated, may be received against any one of the defendants where the statement was not made in his presence, but I am simply stating this to you now so that you will all be advised just the thought that is in my mind. Proceed.

MR. CHAVELLE: Will the Court let the witness answer this question?

THE COURT: He can answer.

MR. CHAVELLE. Note an exception.

The witness then proceeded to testify as follows:

A. And Mr. Matt Starwich called Mr. Ramage and Mr. Hill in and told them that I should go in the other office and talk over the matter and they would give me the instructions what to do.

Q. What instructions would they give you?

A. They told me to go out and locate Ferguson's house.

MR. CHAVELLE: My objection goes to all of this, and I want to note an exception.

THE COURT: Yes.

A. (Continuing) But he did not dare to take the sheriff's car but we could use one of my cars, because I had been using my car right along, and we went out and located his house.

Q. Was that at night?

A. In the afternoon, and at night they sent a

boy out there from the sheriff's department, planted him out there to stay all night and watch Ferguson's movement. He did not find anything that day and in five or six—

MR. ALLEN: The witness should only testify as to what he knows from his personal knowledge.

THE COURT: State what you yourself did.

A. (Continuing) And then I went to the office and they told me which way was the best way to find out, and I said, "I do not know."

Q. What were you trying to find out?

A. I was trying to find out 200 cases that Mr. Ferguson was supposed to have at Ballard Beach.

Q. And what took place?

A. And I can get five cases—

THE COURT: Not the conversation, but what he did.

A. And they told me to go out there and gain confidence with Ferguson.

Q. What did you do?

A. And I told Ferguson—

Q. Did you go to see Mr. Ferguson?

A. Yes, sir.

Q. When did you first see him?

A. I saw him before that. He came down there all the time.

Q. After they gave you the instructions what did you do?

A. In the meantime this Mooring came down there.

Q. Never mind about Mooring. Did you see Ferguson before you saw Mr. Mooring?

A. Yes, sir.

Q. What was that conversation?

A. I told him if there was any possible chance to get 25 cases on the other side of the mountains and he said, "Yes," and I said, "I do not believe you have that much whiskey; I would like to see where this liquor is," and he did not like to take me down there, and he went back there, and I told Mr. Hill and Ramage what I did, and they said to try to get his confidence in any way you can—

THE COURT: Do not give us so much conversation with the sheriff's office. (Tr. pp. 85-88).

The plaintiffs in error, Ferguson and Thompson, denied any identification whatsoever with Pappas or with the transaction, except that Ferguson admitted he and his car were employed by Pappas for the reason Pappas claimed his own automobile had broken down. Ferguson was instructed to drive out to Magnolia Bluff and pick up some packages and bring them down to the Times Square and meet Pappas. By reason of an engagement he previously had it was necessary for him to stop on Pike Street in the City of Seattle, and there he

saw Thompson and asked Thompson if he cared to ride along. Thompson had nothing whatsoever to do with the transaction except as a guest in the car; that neither of the defendants had ever met Mooring or had any conversation with him nor with any of the other Government witnesses until after their arrest.

The questions presented in the record are:

I. Did the Court err in admitting the evidence of the Prohibition agents of declarations made to them by plaintiff in error, Tom Pappas, after his arrest, and without the presence of the plaintiffs in error, Ferguson and Thompson, and to the previous statements of the said Tom Pappas made to the deputy sheriffs without the presence of the said plaintiffs in error, Ferguson and Thompson, as to his conversations regarding their violations of the law, and the statements of the plaintiff in error, Tom Pappas, himself, as to what was said to him by the sheriff and what he said to the sheriff regarding said plaintiffs in error, without their presence?

2. Did the Court err in overruling counsel's for plaintiffs in error Motion in Arrest of Judgment and for a new Trial?

3. Was the jury properly instructed?

ASSIGNMENTS OF ERROR

Assignment No. I.

The Court erred in admitting incompetent evidence to the defendant's prejudice in this, to-wit:

Earl Ramage, called as a witness on behalf of plaintiff in error, Tom Pappas, testified as follows:

Q. And was there any evidence as to the amount of liquor in the cache?

A. The evidence we had—we had several reports, and also had a report that—

MR. CHAVELLE: I object to that.

THE COURT: Proceed.

A. And the way the deal was to come up, he came to us, I think the morning previous to the time he got in this trouble, and he said he could get five cases delivered, and I went to see the sheriff, and the sheriff said, "We do not want fiave cases; we want his cache," and I told Tom that, and I think he was in the office at the time, and he said, "All right," he would do that, and we were to wait for them and he was to call us up and we were to wait for him at the office and we were going up and make the arrests when the liquor was delivered to him by this man Ferguson.

MR. CHAVELLE: I object to that.

A. (Continued). And from there he was to go to the cache. He was to take a load to Spokane.

MR. CHAVELLE. I object to that.

THE COURT: Proceed.

Q. You knew there was to be a delivery that he was mixed up in at that time?

A. I did (Tr. p. 82).

The plaintiff in error, Tom Pappas, was called as a witness on his own behalf.

Q. Tell the jury what that was.

A. Well, I told Matt Starwich the case about Ferguson—

MR. CHAVELLE. Just a minute. I object to that as far as it affects either Mr. Ferguson or Mr. Thompson.

THE COURT: I think I will have to cover this whole matter by the instructions to the jury when the case is finally submitted. I am inclined to think that the rule of law applicable and upon which I would instruct the jury is that if the jury believe from all the evidence presented that there was a conspiracy confederation entered into between the defendants in this case to do the things charged in this information, that the statements made by any one of the defendants in the absence of the other defendants may be considered to determine whether they did the acts charged in the information—not that they could be found guilty of conspiring in this case to violate the National Prohibition Act, but if the conspiracy or confederation was entered into between the parties, then a state-

ment made by any of the parties who entered into the confederation or conspiracy to do the things charged here, could be received in evidence against all the parties who are charged here, and who participated in the actual thing. I will finally dispose of this in my instructions to the jury, as to whether any statements as I have heretofore intimated, may be received against any one of the defendants where the statement was not made in his presence, but I am simply stating this to you now so that you will all be advised just the thought that is in my mind. Proceed.

MR. CHAVELLE: Will the Court let the witness answer this question?

THE COURT: He can answer.

MR. CHAVELLE: Note an exception.

The witness then proceeded to testify as follows:

A. And Mr. Matt Starwich called Mr. Ramage and Mr. Hill in and told them that I should go in the other office and talk over the matter and they would give me the instructions what to do.

Q. What instructions would they give you?

A. They told me to go out and locate Ferguson's house.

MR. CHAVELLE: My objection goes to all of this, and I want to note an exception.

THE COURT. Yes.

A. (Continuing). But he did not dare to take the sheriff's car but we could use one of my cars,

because I had been using my car right along, and we went out and located his house.

Q. Was that at night?

A. In the afternoon, and at night they sent a boy out there from the sheriff's department, planted him out there to stay all night and watch Ferguson's movements. He did not find anything that day and in five or six—(Answering continued). And then I went to the office and they told me which was the best way to find out, and I said, "I do not know."

Q. What were you trying to find out?

A. I was trying to find out 200 cases that Mr. Ferguson was supposed to have at Ballard Beach.

Q. And what took place?

A. And I can get five cases—

THE COURT: Not the conversation, but what he did.

A. And they told me to go out there and gain confidence with Ferguson.

Q. What did you do?

A. And I told Ferguson—

Q. Did you go to see Mr. Ferguson?

A. Yes sir.

Q. When did you first see him?

A. I saw him before that. He came down there all the time.

Q. After they gave you the instructions what did you do?

A. In the meantime this Mooring came down there.

Q. Never mind about Mooring. Did you see Ferguson before you saw Mr. Mooring?

A. Tes sir.

Q. What was the conversation?

A. I told him if there was any possible chance to get 25 cases on the other side of the mountains and he said, "Yes," and I said, "I do not believe you have that much whiskey; I would like to see where this liquor is," and he did not like to take me down there and he went back there, and I told Mr. Hill and Mr. Ramage what I did, and they said to try to get his confidence in any way you can.

THE COURT. Do not give us so much conversation with the sheriff's office.

Q. What did you do?

A. What did I do when?

Q. After you had gone out to see Mr. Ferguson and asked if he could make a delivery of 25 cases east of the mountains then you went back and made a report?

A. Yes.

Q. Then what did you do?

A. At that time this Mooring came down.

Q. Had you seen Mr. Mooring before?

A. Yes sir.

Then continuing, the plaintiff in error, Pappas, told Mooring he would try to get the whiskey and said, "How are you going to take the whiskey, and he said, "I have my house here; I can show you and I have my car," and I (Pappas) said, "I would like to see it," and he took me up there and showed me his house, showed me his car, and I said, "All right, as soon as I get this fellow I will send him to you and you can do business with him," and he said, "I would like to do business with you."

Q. Never mind that. What did you do then?

A. I was meeting Mr. Ferguson.

Q. You tried to meet Mr. Ferguson?

A. Yes sir.

Q.And what was your purpose in negotiating this transaction?

A. I thought if Mr. Ferguson went to get this whiskey for Mr. Mooring he would take me to the cache.

MR. CHAVELLE. Just a minute. My objection goes to all this testimony.

THE COURT: Yes, proceed. (Tr. pp. 85-92).

Max Anderson, a Federal prohibition agent, called as a witness on behalf of the Government, over the objection of counsel, was permitted to testify that plaintiff in error (Pappas) did not say anything at the time, but they took him in the house

and then Pappas said he was a deputy sheriff, and had been working on Ferguson and Thompson for some time, to get them.

MR. CHAVELLE. I object to that.

THE COURT. The objection is sustained.

MR. BROWN: I think it is admissible as conversation between the parties.

THE COURT. Propound the question again. (Last question read).

THE COURT: He may answer.

MR. CHAVELLE: Exception.

MR. ANDERSON (Continuing): Mr. Pappas said he was a deputy sheriff, and had been working on Ferguson and Thompson for some time to land them for selling liquor.

W. M. WHITNEY, called as a witness on behalf of the Government, testified he was assistant prohibition director and legal advisor, and as follows:

A. Mr. Pappas at that time stated that he had employed or gotten in touch with Mr. Ferguson to deliver some whiskey—

MR. CHAVELLE: I object to the conversation for the reason that it is incompetent, irrelevant, immaterial, and no proper foundation has been laid for the question; no showing whether the statement was voluntary or involuntary and whether the defendants were under arrest.

THE COURT: The defendants were all together there?

A. The conversation—my examination was separately, but I warned each one of them first of their constitutional right and told them they did not have to say anything, and anything they said would be used against them, and they did nto have to say anything that would incriminate themselves, and what was said would have to be said freely and voluntarily.

MR. CHAVELLE: I object to what Mr. Pappas said as not being in the presence of Mr. Ferguson or Mr. Thompson.

THE COURT: The jurors will not consider any statements on the part of Mr. Pappas with relation to any of the other defendants, that was not made in the presence of the other defendants. Let me ask you, Mr. Allen, does this statement you are seeking to elicit from Mr. Pappas, is that with relation to himself more particularly, or to the other defendants?

MR. ALLEN: The statement that Mr. Pappas made to Mr. Whitney was with relation to himself. I will limit my question to that extent.

THE COURT: Yes.

The witness Whitney, continuing, then testified that Pappas had told him that he had talked two or three days previously with Deputy Sheriffs Hill and Ramage about apprehending Mr. Ferguson.

MR. CHAVELLE: I object to any conversation about Mr. Ferguson.

THE COURT: The jurors will disregard any statements made by Mr. Pappas as to the defendants Ferguson and Thompson.

MR. WHITNEY (continuing): I then asked him if he had notified the sheriff's office or any of the deputies in the sheriff's office, or any representative of that office, as to this deal with Mr. Mooring, and he stated he had not. I asked him if he intended to arrest Mr. Mooring or Mr. Ferguson or Mr. Thompson, or any one else, and he said he did not intend to arrest them at that time, but intended to report to the sheriff's office later, and I asked him if he did not intend to make an arrest how he expected me to believe he was acting in good faith as a deputy sheriff, and he then stated he thought if he could play Mr. Ferguson along he might find out where he kept his cache.

MR. CHAVELLE: I object to that for the same reason.

THE COURT: Yes. The jurors will disregard that.

A. (continuing) I do not want to answer improperly, but in order to state—

THE COURT: I understand.

The Witness Whitney continuing: I asked him how they were riding out there, and he said the three of them were in the front seat, and Mr.

Ferguson was driving the car. I asked him where he had gotten in touch with Mr. Ferguson.

MR. CHAVELLE. I object to that. I do not think that is fair to tell that to this jury. Certainly not.

THE COURT: I am inclined to think that is getting—

On cross-examination by Mr. Brown, attorney for the plaintiff in error, Pappas, Whitney testified:

Q. He did tell you in that conversation that he had had a conversation and had been talking with Mr. Hill and Mr. Ramage about Mr. Ferguson some days prior?

MR. CHAVELLE: Just a minute. I object to that. He is attempting to secure by cross-examination what the Government could not get by direct examination.

(Last question read).

MR. BROWN: This goes to the gist of the defense of Mr. Pappas. If he acted in conjunction with the sheriff's office he could not be convicted here.

THE COURT: I think that the question should be answered, and the jury will not consider this as any evidence against Mr. Ferguson.

A. Yes, he made some mention of that.

Q. Did he tell you also that Sheriff Starwich

had instructed Mr. Hill and Mr. Ramage to run this gang of bootleggers down?

MR. CHAVELLE: I object to that.

MR. BROWN: It is not anything to laugh about, Mr. Whitney. You are a witness here.

THE COURT: Let him answer.

A. No, sir, he did not tell me or that Mr. Starwich had told his deputies.

Whitney, the witness, then testified, that Pappas had said, "I went to Mr. Hill and Mr. Ramage, and told them that I believed I could get Mr. Ferguson, and they requested me to do it if I could." (Tr. pp. 67-74).

All of this testimony was subsequently admitted over objection of counsel for the plaintiffs in error, Ferguson and Thompson, under a change in the Court's ruling.

L. Reagan, called as a witness on behalf of the Government, testified as follows:

MR. REAGAN: Mr. Pappas claimed to be a deputy sheriff, and he said he was out to catch Mr. Ferguson.

MR. CHAVELLE: I object to that as far as Mr. Ferguson is concerned.

THE COURT: The objection is overruled. I will state this, gentlemen, I have instructed the jury from time to time, or suggested to them on these objections, that no statements made in the absence of a defendant may be considered as against him. That rule is rather broadly stated, and that in sub-

stance will still stand, but I may modify that some upon the instructions, upon this theory—well, I will not say anything further now. Proceed.

Q. Go ahead and tell what the conversation was.

A. The defendant Pappas was warned of his constitutional rights by Mr. Whitney and myself, and he claimed that he was a deputy sheriff and that he was out to get Ferguson, or find his cache, and the question was asked if he had mentioned this to the sheriff's office or to Matt Starwich, and he said he did not, and that he was trying to locate Ferguson's cache. (Tr. pp. 74-75).

Assignment No. II

The Court erred in instructing the jury is relation to a conspiracy:

> "You are instructed, as a matter of law, any statement made by a defendant himself is always admitted, but a statement made in the absence of a person, so that he did not have an opportunity to contradict or to deny it, is not, as a general rule of law, admitted; and at the inception of the trial when the first objection was made, I limited the answer to the defendant who had made the statement. As the trial developed, I observed to counsel, so they would be advised, that possibly a statement under the circumstances, might be taken here in this sort of a case, against a party, when made in his absence, and you are instructed, gentlemen of the jury, that if you believe in this case that

the defendant Pappas and the defendant Ferguson, entered into a conspiracy or confederation, and including the defendant Thompson, if the testimony warrants it, but if they entered into a conspiracy or confederation for the purpose of having transported and sold this whiskey charged in this indictment, then you are instructed that a statement made by either of the parties in the absence of the other party would be admissible in evidence in this trial against such other party, the theory being that if the parties entered into a conspiracy or confederation, then each party entering into that conspiracy or confederation, constituted the other party his agent for the purpose of carrying forward the particular thing that they had conspired to do, and when a person constitutes another his agent to do a particular thing, then he is bound by what the person does or says, in carrying out that particular thing.

So, in this case, if you believe that the defendant Pappas, and the defendant Ferguson entered into a conspiracy, whether the defendant Thompson was a part of that conspiracy or not, then believing that to be established in your mind, you would have a right to consider a statement made by either of the defendants in the absence of the other, testified to in this case.

But, if such conspiracy or confederation has not been established, then you may not consider a statement testified to as made here in the absence of such defendant, against that defendant, but it can only be considered against the person who made it." (Tr. pp. 114-117).

MR. CHAVELLE: I take exception to the instructions of the Court relating to conspiracy. I contend there is no evidence of any such an agreement.

THE COURT: Very well. You may retire, gentlemen of the jury (Tr. pp. 199-120).

Assignment No. III.

The Court erred in refusing to grant defendants' motion for a new trial on the following grounds:

1. That the said verdict was against and contrary to the said law.

2. That the said verdict was against and contrary to the said evidence.

ARGUMENT.

Error in the admission of evidence is claimed under Assignment No. 1. Assignment No. 2 is directed to the error in the instructions given by the Court and Assignment No. 3 goes to the merits of the entire case upon the Court's refusal to grant a new trial.

The first division of Assignment No. 1 goes to the admission by the Court of the testimony of Prohibition agents as to what Tom Pappas, an alleged deputy sheriff, said to them after his arrest and the

arrest of the plaintiffs in error Ferguson and Thompson, while they were being examined by the said prohibition agents separately; said declarations being made by said Pappas without the presence of said plaintiffs in error Ferguson and Thompson; and further, upon reports made by Tom Pappas to the deputy sheriffs, and to Pappas' own statement after he was under arrest as to the position he bore to the plaintiffs in error, which was admitted to go to the jury over the objection of their counsel, and which was prejudicial to the said plaintiffs in error and contrary to law.

The theory upon which the Court proceeded, after persistently sustaining the objections to this class of evidence, was that when a conspiracy is once established, acts or admissions of any one of the conspirators in pursuance of the conspiracy and while it continues, are admissible against the others, upon the theory that the conspirators are agents for one another in the common enterprise.

Connecticut Mutual Life Ins. Co. vs. Hillman, 188 U. S. 218.

But the preliminary question whether sufficient evidence of a conspiracy has been adduced must always *be answered by the Court in the affirmative* as the general rule of evidence. excluding hearsay, will render an admission of one of the conspirators inadmissible against the others.

In this case it is admitted there is no charge of a conspiracy. Nor is it necessary there should

have been such a charge, but the question itself must have been answered by the Court before the declarations and acts of a conspirator could be admitted against his co-conspirator. The Court did not answer this question itself, but as we shall later see, passed it to the jury to decide whether or not there was a conspiracy, even though the alleged declarations which were objectioanble were made by the alleged conspirator after his arrest when the conspiracy, if any, must have ceased. There was no charge of a conspiracy nor did the Government attempt to prove one. The transaction was clearly an agreement between the Government agent, Mooring, and the plaintiff in error, Tom Pappas, for the sale and delivery of whiskey by Pappas to Mooring. Subsequently and after his arrest, Pappas sought to escape the consequences of his acts and declarations by stating that he was himself a deputy sheriff and employed by the sheriff of King County to locate the cache of Ferguson; that he is, himself, innocent of any wrongdoing except that of attempting to apprehend a violator of the law named Ferguson. These admissions and declarations communicated to the Federal prohibition agents and to the deputy sheriffs are received by the Court as evidence against plaintiffs in error Ferguson and Thompson. In this case there is an entire absence of evidence to prove an unlawful combination between Pappas and Ferguson. There is no rule which renders the declarations of an alleged conspirator, given second-handed, admissible to prove

the existence of a conspiracy. Such declarations are made competent only after the conspiracy has been shown to exist.

The case of *Stager vs. U. S.*, 233 Fed. 510, at page 513 reversed the lower court because the preliminary question as to whether or not sufficient evidence of conspiracy had been offered was not not answered by the Court and the general rule of excluding hearsay which would render an admission of one of the conspirators inadmissible against the others should have been exercised by the Court.

In the case at bar the existence of a conspiracy was not shown and there was not a particle of competent evidence of a conspiracy. But, nevertheless, the declarations and admissions of Pappas were admitted as against Ferguson and Thompson.

In the case of *Hanger vs. U. S.*, 173 Fed. 59, the court said:

> "It is a well settled principle of evidence that in a trial on an indictment for conspiracy, after the unlawful agreement has been shown, the acts and declarations of co-conspirators are admissible as a part of the *res gestae*. For this reason the conspiracy must be proved prima pacie or such acts and declarations are inadmissible.
>
> 3 Greenleaf on Evidence (16th Ed.), Sec. 94, Note 1.

In this case there is an entire absence of evidence to prove the unlawful combination, the only evidence being that Pappas was engaged as a deputy sheriff to apprehend Ferguson and to locate his cache of 200 cases of whiskey and it was agreed with Mooring to sell him the whiskey; and that after he brought Mooring and Ferguson together he was going to notify the sheriff. But he never had any agreement with Ferguson except that his car was broken down and he had engaged Ferguson and his car. Mooring and Ferguson had never met until after the arrest. Pappas never alleged any agreement with Ferguson or Thompson, nor was any attempted to be proved.

The case last cited holds that only after the unlawful combination has been established, so as to make the acts and declarations competent as evidence, are such acts and declarations as were committed and made in the course of the conspiracy and in the furtherance of its object admissible. The declarations of Pappas which were admitted in the trial of this case, were as the record shows, made after his arrest and after the overt act had been committed and the purpose of the alleged conspiracy had been accomplished. For these further reasons the declarations were inadmissible as evidence against the plaintiffs in error, Ferguson and Thompson.

> "In all cases the testimony of the admissions or loose conversation should be cautiously received, if received at all. They are incapable

of contradiction. They are seldom anything more than vague expressions of a witness of what he thinks he has heard another say, stated in his own language without the qualifications or restrictions, the tone, manner or circumstances which attended the original expression."

Dalton vs. U. S., 63 U. S. 442.

It is not necessary to refer to any rule or to cite any authorities in regard to the inadmissibility of hearsay evidenec, but we call attention to a leading case on that subject:

Queen vs. Hepburn, 1 U. S. 290.

The Court cannot assume the existence of a conspiracy for the purpose of receiving evidence of the acts or declarations of an alleged conspirator.

People vs. Smith, 162 N. Y. 520.

But the acts and declarations in order to be admissible must have been made in furtherance of the common design. Acts and declarations of conspirators which do not relate to the conspiracy or which are not in furtherance thereof are not admissible over objection.

Dolan vs. United States, 123 Fed. 52;
United States vs. Reid, 210 Fed. 486;
Shea vs. United States, 251 Fed. 440;
United States vs. Schenck, 253 Fed. 212;
Boyle vs. United States, 259 Fed. 803;
Holsman vs. United States, 248 Fed. 103;
Harrington vs. United States, 267 Fed. 97;
Parilla vs. United States, 280 Fed. 761.

In order that the acts or declarations of a conspirator shall be admissible against a co-conspirator they must have been done or made during the existence of the conspiracy.

Steer vs. U. S., 192 Fed. 11.
Logan vs. United States, 144 U. S. 263;
Goll vs. United States, 166 Fed. 419;
Fain vs. United States, 209 Fed. 525;
Feder vs. United States, 257 Fed. 694.

It is not permissible to introduce in evidence as against a conspirator the acts or declarations of a co-conspirator which were done or made after the conspiracy had come to an end.

McDonald vs. U. S., 241 Fed. 973;
Erber vs. U. S., 234 Fed. 221;
Farr vs. U. S., 209 Fed. 525.

Arrest of the co-conspirators usually will preclude so effectually any further concerted action as to put an end to the conspiracy and acts or declarations of one conspirator after his arrest are, therefore, not admissible against another.

Hauger vs. U. S., 173 Fed. 54.

The last case cited, as in the case at bar, is where the declarations complained of were made by the declarant after his arrest.

Where although several persons are charged with the same crime it is not shown that there was a conspiracy between them, the acts or declarations of one, done and uttered out of the presence or hearing of another, are not admissible against the latter.

Fitzpatrick vs. U. S., 178 U. S. 304;
Sparf vs. U. S., 156 U. S. 51;
Hayes vs. U. S., 231 Fed. 106; affirmed 242 U. S. 470;
Itow vs. U. S., 223 Fed. 25;
Tresca vs. U. S., 183 Fed. 736.

The general rule is that the existence of the conspiracy must be proved, at least prima facie, to the satisfaction of the judge, before the declarations or acts are admitted in evidence.

Underhill Criminal Evidence, Third Edition, 966, Sec. 720;
Stager vs. United States, 233 Fed. 510.

What was in the trial Court's mind in admitting the evidence of the various prohibition agents and the deputy sheriffs with reference to the statements made to them by Tom Pappas after his arrest when he had previously so consistently ruled against the admission of the same evidence is without the province of counsel to explain, as the trial Court, itself, utterly failed to answer the question that there was a conspiracy between the various plaintiffs in error, and there is not a scintilla of evidence in the case which would warrant such a finding.

The submission of such evidence to a jury was highly prejudicial to the plaintiffs in error, Ferguson and Thompson, in that it submitted for their consideration the rankest kind of hearsay testimony, in conjunction with the Court's instruction that that such a confederation might exist, where there

was neither the charge nor the proof to sustain it. It gave the jury the opportunity to assume that Ferguson was a huge operator in the illicit occupation of bootlegging, having on hand a cache of over 200 cases which the authorities were tyring to locate, and the deputy sheriffs were permitted to testify that this was their purpose in employing Pappas, while the evidence clearly disproved any such actual condition, an destablished only that Ferguson, by reason of a circumstance that Pappa's car happened to be out of repair, was himself engaged, together with his automobile, by Pappas. This was Pappas' statement to Mooring at the time the agreement for the purchase of the liquor and sale were consummated, and was the statement of all the prohibition agents as to the actual facts leading up to the arrest.

Thompson was only injected into the deal by having the misfortune to have met his acquaintance, Ferguson, and being asked to ride along. There is no other evidence by any of the witnesses, even Pappas, that Thompson had a cache or that he was trying to apprehend him. He surely was not a member of any confederation to violate the law, and still all of the testimony of the various witnesses as to what Pappas told them, after he had been arrested and was trying to escape the consequences of his acts leading up to the making of an agreement with the Government agent, Mooring, and after the existence of any alleged conspiracy must have ceased, resulted in Thompson's being

drawn into a drag net that whether the plaintiffs in error had been either three or fifty, under the Court's admission of the testimony complained of, they would probably all have been convicted, innocent or guilty.

The only conclusion that can be drawn from the admission of this testimony was that Ferguson was a bad man; that the authorities were after him; that the secret reports in the sheriff's office disclosed this state of affairs; all upon the testimony of witnesses whom the jury in all respects believed by reason of their official positions as sheriffs and prohibition agents, and under the direction of the court that they had a right to receive and weigh this character of hearsay evidence.

The only agreement disclosed in the case by the evidence was the agreement between Mooring and Pappas, and neither Pappas nor any of the other witnesses testified that Ferguson or Thompson were members of any confederation, but instead Pappas was an officer pursuing Ferguson, fully deputized so to do in order to apprehend him for violation of the law or to locate his cache. Where at any time there was any evidence of any confederation between Pappas and Ferguson and Thompson, the record fails to disclose. The Court left the question as to whether there was a conspiracy unanswered and submitted that the jury might consider this objectionable testimony if they found that a conspiracy existed, without having first himself

answered this question; that sufficient evidence of a conspiracy had been adduced that the Court might answer in the affirmative that a conspiracy existed; and it was upon this character of hearsay evidence that the plaintiffs in error were convicted.

SECOND

In this subdivision we will discuss:

First, the error of the Court in instructing the jury in relation to a conspiracy as follows:

> "You are instructed, as a matter of law, any statement made by a defendant himself is always admtited, but a statement made in the absence of a person, so that he did not have an opportunity to contradict or to deny it, is not, as a general rule of law, admitted; and at the inception of the trial, when the first objection was made, I limited the answer to the defendant who had made the statement. As the trial developed, I observed to counsel, so they would be advised, that possibly a statement under the circumstances, might be taken here in this sort of a case, against a party, when made in his absence, and you are instructed, gentlemen of the jury, that if you believe in this case that the defendant Pappas and the defendant Ferguson, entered into a conspiracy or confederation, and including the defendant Thompson, if the testimony warrants it, but if they entered into a conspiracy or confederation for the purpose of having transported and sold this whiskey charged in this indictment, then you are instructed that a statement made by either of the

parties in the absence of the other party would be admissible in evidence in this trial against such other party, the theory being that if the parties entered into a conspiracy or confederation, then each party entering into that conspiracy or confederation, constituted the other party his agent for the purpose of carrying forward the particular think that they had conspired to do, and when a person constitutes another his agent to do a particular thinv, then he is bound by what the person does or says, in carrying out thta particular thing.

So, in this case if you believe that the defendant Pappas, and the defendant Ferguson entered into a conspiracy, whether the defendant Thompson was a part of that conspiracy or not, then believing that to be established in your mind, you would have a right to consider a statement made by either of the defendants in the absence of the other, testified to in this case.

But, if such conspiracy or confederation has not been established, then you may not consider a statement testified to as made here in the absence of such defendant, against that defendant, but it can only be consided against the person who made it."

MR. CHAVELLE: I take exception to the instructions of the Court relating to conspiracy. I contend there is no evidence of any such agreement.

THE COURT: Very well. You may retire, gentlemen of the jury. (Tr. pp. 119, 120). ,

The cases cited in support of the first assign-

ment of error in subdivision one are applicable here, but particular reference may be made to the case of *Hanger vs. United States,* 173 Fed. 59. There defendant's counsel objected to the admission of testimony and was overruled b ythe Court and duly excepted. Previously the Court seems to have admitted this statement of Menear on the ground that it was a declaration of a co-conspirator, for the Court charged the jury: That if they believe from the evidence that the defendant was an accomplice or co-conspirator with the witness, George Menear, for the making or passing of counterfeit coin, that any statement or confession made by Menear, while conspiracy between him and defendant existed is evidence against the defendant.

In this case there was an entire absence of evidence to prove the unlawful combination between Menear and the defendant. It is true that Menear stated to Washer, so Washer testified, that about the 1st of October, 1915, he, Menear, and the defendant entered into an agreement or conspiracy to make and pass counterfeit coin. But as to that fact the declaration of Menear was only hearsay. There is no rule which renders the declarations of an alleged conspirator, given second-handed, admissible to prove the existence of the conspiracy. Such declarations are made competent only *after the conspiracy had been shown to exist.* In this view the alleged declarations of Menear were clearly incompetent. If, however, the unlawful combination between Menear and the defendant had been establish-

ed so as to make the acts and declarations of Menear competent as evidence on the trial of the defendant, such acts and declarations of Menear as were committed or made in the *course* of the conspiracy and in furtherance of its object would have been admissible. The declarations of Menear which were admitted in the trial of this case, were as the record shows, after the overt act had been committed and the purpose of the alleged conspiracy had been accomplished. For these reasons the said declarations were inadmissible as evidence against the defendant.

In the case at bar it was after the arrest of Pappas, when he was taken to the prohibition director's office, that he made the declarations which were admitted against the plaintiffs in error, Ferguson and Thompson. Under this instruction of the Court, in which the Court admitted the general rule that "hearsay" evidence is in its own nature inadmissible. That this character of testimony pre-supposes some better testimony which might be adduced in the particular case is not the sole ground for its exclusion. Its intrinsic weakness, its incompetency to satisfy the mind of the existence of the fact and the frauds which might be practised under its cover, combine to support the rule that hearsay evidence is totally inadmissible.

And our own Circuit Court in *Dolan vs. United States,* 123 Fed. 52, reversed 116 Fed. 578, after granting a petition for rehearing, in said case said, "One of the instructions that is deserving of careful consideration reads as follows:

"If from the evidence you find that at the time Wilson Meisner made the statement as testified to by Palmer, the defendant Dolan was already in collusion and conspiracy with the defendants Allen and Hawkins, or, as a result of the communication of the statement made by Meisner, Dolan joined Allen and Hawkins soon following such statement, and that when said Wilson Meisner used this pronoun 'he' in the conversation referre dto by Palmer, he meant, and was understood to mean R. J. Embleton, it is circumstances you may consider."

While the Court in giving this instruction admitted what was, indisputably, hearsay testimony, he did not pretend to caution the jury that there ought not to be a conviction on such testimony without corroboration, and that the corroboration in the case must come from other evidence than the testimony of co-conspirators.

United States vs. Logan, 45 ed. 872, reversed on other grounds in 144 U. S. 263;
United States vs. Sacia, 2 ed. 754;
United States vs. Smith, 16 Fed. 322.

The whole question was a matter of the competency of the evidence, and addressed to the Court, not to the jury, and it was without the province of the jury to pass upon the competency of the evidence; and the Court instructed the jury, as heretofore, to find what it was wholly in his province to determine.

Stager vs. United States, 233 Fed. 510, page 513 (infra).

United States

3

Circuit Court of Appeals

For the Ninth Circuit

TOM PAPPAS, CHARLES H. FERGUSON and OLIVER THOMPSON,

Plaintiffs in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

No. 4037

BRIEF OF TOM PAPPAS, ONE OF THE PLAINTIFFS-IN-ERROR

UPON WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

DANIEL LANDON
Attorney for Tom Pappas, One of the Plaintiffs-in-Error

Filed
AUG 31 1923
F. D. Monckton,
Clerk

United States
Circuit Court of Appeals
For the Ninth Circuit

TOM PAPPAS, CHARLES H. FERGUSON and OLIVER THOMPSON,
Plaintiffs in Error,
vs.
THE UNITED STATES OF AMERICA,
Defendant in Error.

No. 4037

BRIEF OF TOM PAPPAS, ONE OF THE PLAINTIFFS-IN-ERROR

UPON WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

Tom Pappas, one of the plaintiffs-in-error was charged with the crime of violating the National Prohibition Act, as follows:

1. Having possession on June 30th, 1922, at Seattle, of the following intoxicating liquors containing more than one-half percent by volume of Alcohol, to-wit:

(a) Forty-six bottles, each containing one-fifth gallon of whiskey.

(b) One hundred twenty pints of beer.

2. Transportation on the same day at the same place of the same intoxicating liquors.

3. Sale on the same day at the same place of the same intoxicating liquors.

The Jury found plaintiff-in-error Tom Pappas guilty on all three counts.

He was sentenced to imprisonment for six months in the King County Jail in King County, Washington, and to pay a fine of Five Hundred ($500.00) Dollars and costs.

ASSIGNMENTS OF ERROR

1. That the Court erred in allowing testimony to go to the jury during the trial of said cause, over the objection of plaintiff-in-error's counsel, of the testimony of various witnesses as to the statements made without the presence of plaintiff-in-error as to the three charges contained in the indictment.

2. That the said Court erred in allowing testtimony to go to the jury during the trial of the case, over the objection of plaintiff-in-error's counsel, which was excepted to at the time by the plaintiff-in-error's counsel, and exception allowed.

3. That the said Court erred in overruling the plaintiff-in-error's motion for a new trial.

4. That the said Court erred in instructing the jury with relation to a conspiracy, and further instructing the jury that if they found a conspiracy, the evidence of one of the plaintiffs-in-error might be used against all, to which plaintiff-in-error excepted and exception allowed.

5. That the Court erred in failing to instruct the jury that the statement of a conspirator is not evidence against his co-conspirator, unless there is other corroborating testimony.

6. That the Court erred in denying the motion of plaintiff-in-error to dismiss the indictment and for an instructed verdict for the plaintiff-in error upon the following grounds:

(a) That the plaintiff-in-error was acting as a Deputy Sheriff of King County, and was under the direction of deputies of the Sheriff of King County in the transaction.

(b) The testimony affirmatively shows that the plaintiff-in-error was acting in the transaction without any criminal intent whatever and in furtherance of the enforcement of the law by his superior officers.

(c) That the entire evidence failed to show that the plaintiff-in-error transported the liquor as charged in the indictment.

(d) That the entire evidence failed to show that the plaintiff-in-error had in his possession the liquor as charged in the indictment.

(e) The testimony affirmatively shows that the plaintiff-in-error did not commit the offense of selling the liquor charged in the indictment but the acts therein alleged and essential to the crime charged, were the acts of other persons than the plaintiff-in-error, but instead the proof of the defendant-in-error showed that the sale of liquor essential to the proof of the crime charged was another person's crime, and no competent testimony was offered to connect plaintiff-in-error with the offense charged.

That for about five years last past Tom Pappas, one of the plaintiffs-in-error has held a commission as a Deputy Sheriff of King County, Washington, and as such Deputy Sheriff has been employed by

the present Sheriff Matt Starwich and his predecessor, John Stringer, from time to time on special assignments or details to obtain evidence and make arrests on particular cases; among other cases assigned to him he obtained evidence of the operation of the largest still which has been seized in King County, and assisted in the seizure of said still and the arrest and conviction of the operator thereof: He has not received a regular monthly salary from the sheriff for his services, but has been compensated for the work done by him from time to time as aforesaid.

That prior to June 29th, 1922, Matt Starwich, as Sheriff of King County, Washington, called him and requested that he investigate and obtain evidence of the operation of one Charles L. Ferguson, co-plaintiff-in-error in this case; that Sheriff Starwich requested him to confer with Deputy Sheriff J. C. Hill and Deputy Sheriff Earl Ramage and take his instructions from them. He was instructed to gain the confidence of Ferguson by whatever means were necessary; that after receiving said instructions he got in touch with the said Ferguson and also with one H .V. Mooring, and arranged with Ferguson and Mooring that Ferguson should sell and deliver to Mooring the liquor mentioned in the information in this case;

He went with Ferguson in the latter's automobile to the residence of Mooring in the City of Seattle, and from there he and Ferguson went away in the said automobile for the purpose of getting the liquor and delivering it to Mooring; that it was his plan, and he expected, to accompany Ferguson to the latter's cache for the purpose of getting the liquor, and thus ascertaining the location of the cache. Ferguson, however, upon leaving Mooring's house, proceeded in his machine to Sixth and Pike Street in Seattle, where Ferguson got in touch with one Oliver Thompson, the other plaintiff-in-error. Thompson was a man whom this plaintiff-in-error had never seen nor known before. Ferguson and Thompson thereupon had some conversation together and stated to this plaintiff-in-error that they would not at the time take him to the cache, but that Ferguson and Thompson would go to the cache and get the liquor and would pick him up in about twenty minutes at Times Square where he should wait for them. He did wait at Times Square for about an hour before Ferguson and Thompson returned. During that time he did not know whether Ferguson and Thompson had abandoned him and would not return or whether they would return at any moment. He therefore did not call for

any additional assistance from the Sheriff's office at that time for fear of exciting the suspicions of Thompson and Ferguson if they should appear.

Thompson and Ferguson did return after about an hour's absence, bringing with them in the machine the liquor mentioned in the information in this case. He got in the machine with them and went to Mooring's residence. This plaintiff-in-error got out of the machine and was going in Mooring's house to telephone the Sheriff's office. Mooring called him back and asked that he assist in pulling a tent or canvas over by the garage. He complied with the request and as he did Mooring thrust unto this plaintiff-in-error's hands a roll of currency and a check which were rolled up with a rubber band around them. He started to protest and to tell Mooring that the money did not belong to him and should go to Ferguson. Before this plaintiff-in-error could finish the sentence and before he could hand the money back two Federal Prohibition Agents appeared and informed him that he was under arrest. He informed the prohibition agents at that time that he was a deputy Sheriff and asked permission to telephone to the Sheriff's office.

On the trial of this case, Deputy Sheriff J. C. Hill and Deputy Sheriff Earl Ramage testified on

behalf of this plaintiff-in-error substantially to the same facts hereinabove set forth with relation to this plaintiff-in-error's commission as a Deputy Sheriff. They testified that he was working under their instructions and in his official capacity as a Deputy Sheriff, and for the purpose of obtaining evidence concerning Ferguson and his cache in the very transaction for which he was prosecuted and convicted. In good faith and in obedience to the instructions of the Sheriff's office, was endeavoring to suppress law violation and was endeavoring specifically to obtain evidence concerning said Ferguson and his supposed supply of liquor for the purpose of the prosecution and conviction of said Ferguson and the suppression of his illicit dealings. He had no expectation of any gain or pecuniary benefit other than such compensation as he would be paid by the Sheriff of King County for his services in the matter. He did not expect to receive any money from Mooring or any one else and would have returned the money if it had not been for the fact that he was placed under arrest immediately after the money was thrust into his hands.

Respectfully submitted,

DANIEL LANDON,

Attorney for Tom Pappas, One of the Plaintiffs-in-error

No. 4037

In the United States Circuit Court of Appeals

For the Ninth Circuit

TOM PAPPAS, CHARLES H. FERGUSON and OLIVER THOMPSON,

Plaintiff in Error,

—VS.—

THE UNITED STATES OF AMERICA,

Defendant in Error.

UPON WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

HON. JEREMIAH NETERER, *Judge*

BRIEF OF DEFENDANT IN ERROR

THOS. P. REVELLE,
United States Attorney,
CHARLES P. MORIARTY,
Special Assistant United States Attorney,
J. W. HOAR,
Assistant United States Attorney,
Attorneys for Defendant in Error.

Address: 310 Federal Building, Seattle, Wash.

SHERMAN PRINTING AND BINDING CO., SEATTLE, WASH.

No. 4037

In the United States Circuit Court of Appeals

For the Ninth Circuit

TOM PAPPAS, CHARLES H. FERGUSON and OLIVER THOMPSON,

Plaintiff in Error,

—vs.—

THE UNITED STATES OF AMERICA,

Defendant in Error.

UPON WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

HON. JEREMIAH NETERER, *Judge.*

BRIEF OF DEFENDANT IN ERROR

STATEMENT OF THE CASE

The plaintiffs in error, Tom Pappas, Charles H. Ferguson and Oliver Thompson were found guilty of the offense of the possession, transportation and sale of intoxicating liquor in violation of the Act

of Congress passed October 28, 1919, known as the National Prohibition Act, on the 30th day of June, 1922, and the plaintiffs in error, Tom Pappas and Charles H. Ferguson, were each sentenced to serve a term of six months in the county jail and to pay a fine of $500, while the defendant Oliver Thompson was sentenced to serve ninety days in the County Jail.

The undisputed facts of the case are as follows: That on the 29th day of June, 1922, in the evening, H. V. Mooring, a National Prohibition Officer, made arrangements with Tom Pappas, one of the plaintiffs in error, for the delivery and sale of whiskey to Mooring on the following day. That about 2 o'clock the following afternoon, Pappas and plaintiff in error, Ferguson, drove up to Mooring's home in Ferguson's car and Mooring gave Pappas an order for 2 cases of whiskey to be delivered to Mooring's garage as soon as it could be obtained; that Ferguson and Pappas then left and returned about two hours later, together with plaintiff in error Thompson, and about 9 sacks of liquor consisting of whiskey and beer; that they drove up to and into the alley near Mooring's garage; that Pappas then got out of the car and went over toward Mooring's garage, a distance of about 15 or

20 feet to where Mooring was standing, and received from Mooring $55.00 in currency and a check for $80.00 and was assisting Mooring in moving a piece of canvas to be used in concealing the liquor when he (Pappas) and the plaintiffs in error were placed under arrest by Mooring and two other Prohibition agents who had been previously stationed in the garage; none of the liquor had been removed from Ferguson's car.

The evidence of defendant Pappas during the trial admitted substantially all of the transactions had with Mooring leading up to the delivery and sale of the liquor, but he attempted to explain and justify his part in the deal upon the theory that he was a special Deputy Sheriff of King County; that he owned no liquor himself, but at the request of the office of the Sheriff of King County, he had been endeavoring to locate 200 cases of liquor which Ferguson was supposed to possess in a cache somewhere; that he was attempting to bring Mooring and Ferguson together and would in that manner locate the cache and have Ferguson and Mooring arrested after the sale and delivery of the liquor; that the liquor seized belonged to Ferguson; that Ferguson would not go after the liquor until he had seen the party to whom it was to be sold and

delivered; that after he (Ferguson) had satisfied himself that the deal was all right by visiting Mooring in advance, he went after Thompson, to whom he referred as his "partner"; that after a consultation with Thompson, it was announced that Pappas could not accompany them to get the liquor and they would pick him up when they returned; that this refusal was due to their distrust of Pappas at that time; later they returned and the three of them drove to Mooring's garage and that while Pappas was helping Mooring to move a tent to be used to cover the liquor, Mooring slipped a roll of currency into his hands, telling him to hold it, and that before he could remonstrate or notify the sheriff's office of the deal, he was arrested.

Defendant Ferguson, by his evidence, attempted to show that he accidentally met Pappas on the street and at the request of Pappas, he drove Pappas to Mooring's house on the 30th of June, 1922, the afternoon in question; that Pappas got out of the car and had a conversation with Mooring "right outside the car," but that Ferguson did not hear any of it, and did not hear Mooring give an order for any liquor; that immediately thereafter, Pappas requested him to drive to a certain house

in one of the outlying parts of Seattle, to get a "couple of packages"; that when he and Thompson, whom he met quite by accident at the Windsor Pool Room, arrived at the place designated, he could see no house, but some men whom he did not know were standing by the road who asked him if he was Ferguson and if he had been sent by Pappas, and *they* put the sacks in his car; that he was not the owner of the liquor and had no reason to suspect that he was hauling liquor, or that he was being asked to haul liquor; that at no time from the time when he first met Pappas, had liquor been mentioned to him; that he was hauling the sacks as an accommodation only; that he did not hear any bottles rattle in the sacks; that he did not hear any of the conversation between Mooring and Pappas when they arrived at Mooring's house the second time for delivery of liquor and did not see any money pass.

Defendant Thompson, by his evidence, attempted to show that Ferguson merely asked him to take a ride in his car; that he had no interest in the liquor or in the transaction; that he had no reason to suspect that there was liquor or bottles in any of the 9 sacks placed in the rear of the car; that he had known Ferguson for a number of years

and had worked for him "on and off" as an engineer on his boats; that he was nothing more or less than a passenger or guest in Ferguson's car.

ARGUMENT

The brief of the plaintiffs in error, Charles H. Ferguson and Walter Thompson, presents for the consideration of this court three questions, viz.:

(1) Did the court err in admitting the evidence of the prohibition agents of declarations made to them by plaintiff in error Tom Pappas after his arrest and without the presence of the plaintiffs in error Ferguson and Thompson to the previous statements of the said Tom Pappas made to the deput sheriffs without the presence of the said plaintiffs in error Ferguson and Thompson as to their violations of the law, and the statements of the plaintiff in error Tom Pappas himself, as to what was said to him by the plaintiffs in error and what he said to the sheriff regarding said plaintiffs in error in their absence? And if so, was it prejudicial error.)

(2) Did the court err in overruling the motion in arrest of judgment and for a new trial made by the counsel for plaintiffs in error?

(3) Was the jury properly instructed?

In the trial of the case, the court permitted prohibition agents to testify to conversations and declarations made to them b Pappas after his arrest upon the theory that they were binding, first, upon Pappas himself as one of the defendants, and second, that if it should develop that there was sufficient evidence before the jury to permit them to find that a conspiracy existed among the defendants to violate the law, that said declarations and admissions may be binding upon the defendants Ferguson and Thompson, although made in their absence. It is urged by counsel for plaintiffs in error that none of these statements made after the arrest were admissible until the court had first affirmatively decided that a conspiracy existed. The Government concedes that as a general statement of law, counsel's position is correct when applied to certain cases, but contends that in this case they were properly admissible under the correct instructions and guidance of the court.

In the case of *State vs. Mann*, 39 Washington 150, the following appears in a case where the confession of a wife jointly charged with a husband with the crime of arson made after arrest was admitted against the husband over objection

of appellant and its admission was assigned as error, the court said:

> "The first (objection) is that the confession of one conspirator made after the conspiracy has come to an end can not be given in evidence as against a joint conspirator. A long list of cases is cited in support of this contention and undoubtedly the rule is correctly stated in the case of the appellant but as we have before pointed out, the appellant was informed against and tried for a *consummated offense*, not for conspiracy with another or others to commit an offence, and the rules applicable to the admission and introduction of evidence in the one case are not the same as they are in the other. * * * In order to convict the appellant, it was necessary for the state to prove the crime as alleged; that is to say, it must show, first, that Nettie Mann committed a crime of arson, and second, that the appellant aided and abetted her therein. The state, in order to prove the first of the requests, resorted to any evidence which would have been admissible had Nettie Mann herself been upon trial. This would include her confessions and admissions, as well as any other competent evidence tending to prove the crime as laid. But it is thought the confessions were inadmissible because they implicated the appellant. Such is not the rule. The jury are ordinarily entitled to confessions as they are made, and in this case to have eliminated from the confessions, all reference to the

appellant would have left them unintelligible and incompetent for an purpose. The authorities, so far as we have been permitted to examine them, uniformly hold that the act, declarations and confessions of the principle are admissible as evidence on a separate trial of the accessory."

In 44 Washington 207 at page 209, *State vs. Dilley*, the court said:

"'I think I will rule this way; that her statements made at that time, if she made any, are competent evidence against her at this time. But as to whether or not it constitutes any evidence against the other two defendants depends upon whether or not proof shows that there was concerted action between all three of the defendants'. We think this was manifestly the correct ruling at the time. The conversations were certainly admissible as against Mrs. Dilley. As the State could not introduce its whole chain of evidence at one time it remained to be seen whether such facts would appear as would make it admissible against the co-appellants. The parties were being tried jointly, and such evidence as was admissible against one of them was properly admitted. Its applicability to the others to be thereafter controlled by proper instructions when all of the evidence was introduced. For convenience, the acts and declarations of one are admitted before sufficient proof of a conspiracy is given, the State undertaking to furnish such proof at

> a subsequent stage of the cause. 1 Greenleaf, Evidence, 16 Ed. 184-A; *State vs. Winner*, 17 Kans. 298; Underhill Criminal Evidence, par. 494."

In the case of *State vs. Williams*, 62 Wash. 286, at page 290, after citing the next preceding quotation with approval, the Court said:

> "In the several cases cited by this Court, and to which we have referred, there was no charge of conspiracy made in the information, the Dilley case and the McCann case being robbery cases and the charges being brought under the statute defined with crime. It is thus indicated that the admissibility of such testimony can not be resolved by looking to the form of the pleading. It must be decided by reference to the facts and circumstances of the particular case. If the defendant be charged with another, and the facts show a concert of action, a verdict will not be overthrown because it has been necessary in the development of the case to show the conduct and conversation of the parties and if in the end it is made to appear that both of the defendants were parties to the crime. 3 Encyclopedia, Evidence 420, *Goins vs. State*, 46 Ohio State 457; 21 N. E. 476; *State vs. Montgomery*, 56 Iowa 195, 9 N. W. 120.

In *State vs. Pettit*, 74 Wash. 510 at page 521, the Court said:

"There is sufficient evidence that the defendant and his wife were acting in concert with a common criminal design to make the declarations of the wife admissible as against her husband the defendant. Where concert of action is shown, every party thereto becomes a party to the particular as well as the subsequent acts of others in furtherance of the common design. In 1 Greenleaf on Evidence, 16th Edition, par 184-a, it is said:

'Every one who does enter into a common practice or design is generally deemed, in law, a party to every act which had before been done by the others, and a party to every act which may afterwards be done by any of the others in furtherance of such common design.' "

In 16 Corpus Juris, p. 65, par. 1288 we find:

" * * * When on a joint trial of several defendants, evidence of declarations by one is attempted against him, although not admissible against the others because no conspiracy has been shown, subsequent proof of the conspiracy authorizes consideration of such evidence against all defendants shown to have been parties thereto. 181 Mass. 184, 63 N. E. 421."

In *State vs. Wappenstein*, 67 Wn. 502, at page 511, the Court quotes from 8 Cyc, 682 as follows:

"On account of the difficulty in proving the conspiracy and bringing the guilty to justice,

there is no class of cases in which it has seemed important that the trial judge should have a large discretion as to the order in which evidence should be received, and this discretion can not be reviewed on error except in clear cases of abuse. It is frequently said that the acts and declarations of one conspirator can not be admitted in evidence against his fellow conspirator until proof has been made of the existence of a conspiracy. There is, however, no varying rule to this effect. According to the court, weight of authority or order in which the testimony shall be received is largely in the discretion of the trial court. If the circumstances of the case are so peculiar and urgent as to require it, the acts and declarations of a conspirator may be introduced in the first instance before proof of the agreement."

In the case of *Latham vs. United States*, 210 Federal, 159 at page 161, the Court said:

"In this connection we notice that the trial court instructed the jury that if they believed beyond reasonable doubt that there was a common practice and design upon the part of John Northcott and Henry Latham that the witness, Bessie Pettit, should be transported from Grand Saline, Texas, to New Orleans, Ala., over the line of a common carrier in interstate journey for the purpose of prostitution, then the statements made by Northcott to the witness, Bessie Pettit, bearing upon the common

practice and design, would be admissible as evidence against the defendant Latham; but, if no such common practice or design was shown, the evidence should not be considered by them against the defendant Latham. There can be no doubt that the rights of the defendant, with regard to this evidence, were fully protected."

See also

Sparf vs. U. S., 156 U. S. 51, at page 57.

In 263 Federal 12, at page 15, par. 2, the Court said:

"When it is said that error was committed in allowing the attorney for Antoon to testify that after the latter had told the former as to his transaction with Samaras, the attorney took Antoon to the United States Attorney's office, which led to the indictment in this case. We are told that this is a clear violation of the rule, that what is said or done by one of the conspirators after the conspiracy is ended in the absence of the defendants on trial, is totally inadmissible. The rule is admitted, but its application to the facts is denied. On his direct examination, Antoon testified that he first went to his attorney and told his story and that his attorney took him to the District Judge to whom he confessed his crime. The attorney was permitted to testify that, after Antoon confessed to him, instead of taking Antoon first to the district attorney, he took him direct to the District Judge. *This is*

simply a part of the history of the transaction, and as such the Government was entitled to it. The objection at all events seems to us quite unimportant and we fail to see any relation between this occurrence and the rule that the statement of a conspirator in the absence of his common conspirators, after the conspiracy is ended, is not admissible."

In 279 Federal 255, the Court said:

"The theory of the prosecution was that Parisi was a principle and that he had aided, abetted, etc. Sara Cina and Frank in making the unlawful sale on November 9 * * *. That it was not necessary that one who aids and abets the commission of a crime need be present when a crime is committed is no longer arguable. *Vane vs. United States*, 254 Federal 32. The testimony as to the conversations and events of November 10 was adduced not for the purpose of proving the commission of a crime on November 10, but to show that Parisi was a party to the sale by Sara Cina and Frank the night before. That admissions or confessions made after the commission of a crime are admissible in evidence, when properly obtained, is too elementary for discussion. So, also the finding later in defendant's possession of a quantity of drugs of the same kind as previously sold is a fact which, woth other facts, was properly submitted to the jury.

In *Burns vs. United States*, 279 Federal 982, p. 986, the Court said:

> "It is also argued that the Court erred in permitting several witnesses to testify to statements made to them by Banks when they turned over their money to Banks to the effect that Burns was interested with him in the cattle and hog business. Conceding this to have been an error, it is not prejudicial because Burns later went on the stand and testified that he and Banks were to share the profits."

The defendant in error contends that the declaration and statements made in this case by Pappas, Ferguson and Thompson to the various prohibition officers were admitted by the Court under proper instructions so as to safeguard each defendant in his rights. That if any error were committed by the Court in permitting the introduction of the statements of Pappas relative to Ferguson and Thompson, it was harmless error and not prejudicial to the defendants Ferguson and Thompson, because the defendant Pappas took the stand and testified to practically the entire testimony of the Government agents concerning his declarations and was subjected to cross-examination by counsel for defendants Ferguson and Thompson.

The testimony given by Pappas relative to conversations had with deputies in the office of the Sheriff of King County were clearly admissible as

tending to show that he was performing his duties as an alleged officer of the law, and it was for the jury to determine whether or not to believe his testimony. Had such testimony been excluded by the trial court, it would have been reversible error. In 9 Cranch 71, 74, 3 L. Ed. 660, it is said:

> "It can not be regarded as an oppressive rule to require of a party who has violated a penal statute to make out the *vis major* under which he shelters himself, so as to leave no reasonable doubt of his innocence; and if, in the course of such vindication he shall pass in silence, or leave unexplained, circumstances which militate strongly against the intergrity of the transaction, he can not complain if the Court shall lay hold of those circumstances as reasons for adjudging him in delicito."

The defendant Pappas was entitled to explain his conduct in any reasonable manner; if he had not done so, his silence would have been construed strongly against him.

Assignment number two is directed to the error in the instructions to the jury given by the Court. In addition to the instructions quoted in the brief of plaintiff in error, on pages 35 and 36, the Court instructed the jury as follows:

> "You are instructed that as a matter of law if the defendant Thompson was an innocent

spectator on this trip and merely a passenger or guest—a passenger upon Ferguson's car, or a guest of Ferguson accompanying him upon this trip, innocent of the purpose or motives of this trip, and had nothing to do with it, then the defendant Thompson would not be guilty, because he did not have guilty knowledge of anything that transpired.

"You are instructed that if the defendant Ferguson went out there to get some packages, he not knowing what the packages were, and not knowing what the packages were placed into the car for, and hauled this whiskey from the place where it was loaded into the car to the place where it was found, he not knowing what it was, he, the defendant Ferguson would not be guilty. * * *

"So, in this case, it is for you to determine what relation these defendants had to this transaction and what the facts were.

"* * * But, if such conspiracy or confederation has not been established, then you may not consider a statement testified, to as made here in the absence of such defendant, against that defendant, but it can only be considered against the person who made it. * * *

"In this case, you will consider this case fairly and conclude it from the evidence as you have heard it, and as it has been developed and disclosed by the witnesses upon the stand. * * *"

The Government contends that if any error was

committed by the Court, the same was cured when the entire charge of the Court is considered; the jury found all three defendants guilty of each count charged in the information and under the instructions of the Court it must be presumed that they found a common intention and design by the defendants to violate the law. In *Bryant vs. United States*, 257 Federal, p. 383, the Court said:

> "The plaintiffs in error complained of the admission in evidence of an alleged statement testified to by the Government witness Williams to have been made by their co-defendant Bergfeldt, who was acquitted, that he had papers in his possession that might put him in the penitentiary if it were known. The admissibility of this statement, as against the defendant, who made it, is clear. If admissible as to Bergfeldt, the other defendants should have requested that its effect be limited to Bergfeldt in order to put the Court in error for not so limtiing it. However, Bergfeldt was acquitted, and in order to reach that result, the jury must have found that he did not conspire with any of the plaintiffs in error for the indictment charged no other offense against him. The Court did charge the jury that they should consider declarations of defendants only against themselves, or those of their co-defendants who were shown to have been present and to have heard them, unless they first found a conspiracy to have existed between the defendant

making the declaration and those against whom it was asked to be considered. The jury, therefore, as they were instructed, must have considered the statement objected to against Bergfeldt only, since they found the plaintiffs in error had not conspired with him by their verdict of acquittal. Its admission, therefore, worked no injury to the plaintiffs in error."

The third error assigned is that the court failed to sustain the motion made by plaintiffs in error for a new trial and in arrest of judgment for insufficiency of the evidence to show that Ferguson had anything more to do with the transaction than as a freighter and that Thompson was anything more than a passenger or guest in Ferguson's car.

The Government contends that there was ample evidence to show, in light of all of the surrounding circumstances, that defendants Ferguson and Thompson must have known that there was liquor in the sacks being hauled; that they were men of experience, Ferguson having admitted under oath that he had at some previous time caused the dismissal of police officers for "knocking him over" and taking liquor away from him; that the fact that all three defendants were present at the sale of the liquor, and had same in their possession, constituted a *prima facie* case of knowledge and

criminal intent on the part of all three defendants, and put upon them the burden of making a clear and satisfactory explanation of their possession. In Bishop on Criminal Iaw, Vol. I, Par. 656, it is said:

> "If persons are together committing a misdemeanor, each one's act is that of all, the same as in felony; for the same reasons control this case as the other. And the possession of a thing by one contrary to the prohibition of a statute, is the possession of all."

To the same effect and necessity of explanation, reference is made to the citation hereinbefore set forth from 9 Cranch 71, 74, 3 L. Ed. 660.

The defendants attempt to explain the acquisition of the liquor in different ways and seek to say that it was delivered to the car by some mysterious persons, whom nobody knows, and whom none of the defendants had ever seen before, which is the alibi of guilty persons, with their backs to the wall, as ancient as the law itself; their testimony does not agree, but the fact remains that an order was taken for liquor and by two of the defendants, and in less than two hours time, a delivery was made and the sale consummated, as to part of the liquor and no explanation given as to the destination of the balance of the contraband; the defendants Ferguson and Thompson ask to be exonerated because they

were not present when the original negotations were entered into; In *Samara vs. United States* before referred to, we find, on page 16 in 263 Federal Reports:

> "The Court was asked at the close of the case to direct the jury to acquit the defendant Baloutin, both on the first and second counts. This the Court refused to do, and the refusal has been assigned as error. It would serve no good purpose to review in detail the testimony in relation to this particular defendant. We have read it with care, and we are entirely satisfied that the Court was quite justified in leaving the question of Baloutin's guilt to the jury. It is not at all material whether he was one of the original conspirators or not; for the law is clearly established that, when a conspiracy is once entered into by two or more persons, others may join while it is continuing, and if they do, they make themselves liable to the same extent as those who originated it. It is sufficient that Baloutin came into the conspiracy prior to the consummation of the act to be done in pursuance thereof. *United States vs. Stone* (D. C.) 188 Fed. 836. A person coming into a conspiracy after its formation is deemed in law a party to all acts done by any of the other parties, either before or after, in furtherance of the common design. *Hedderly vs. United States*, 193 Fed. 561, 114 C. C. A. 227."

In *Bannon vs. United States*, 156 U. S. 464 at 469 the court says:

"To require an overt act to be proven against every member of the conspiracy or o distinct act connecting him with the combination to be alleged, would not only be an innovation upon established principles but would render most prosecutions nugatory."

II Wharton Crim. Cases, Par. 698 at page 1432:

"Hence a foundation must be first laid by other evidence, by proof sufficient in the opinion of the court to establish *prima facie* the fact of a conspiracy between the parties. Where the evidence is sufficient in the opinion of the court to establish the *prima facie* case, and it is admitted, it is for the jury to say upon all the evidence under the instructions of the court, whether or not the conspiracy existed. The evidence supporting a conspiracy is generally circumstantial; it is not necessary to prove any direct act, or even any meeting of the conspirators, as the fact of conspiracy must be collected from the collateral circumstances of each case. It is for the court to say whether or not such connection has been sufficiently shown, but when that is done, the doctrine applies that each party is an agent for all the others, so that an act done by one, in furthering the unlawful design, is the act of all, and a declaration made by one, at the time, is evidence against all."

It is submitted that there was ample evidence

proper to go to the jury and tending to establish every element of the crime charged in the information, and that the weight and credibility of this evidence was for the jury; and that if the trial court did not feel warranted in sustaining the motion in arrest of judgment or in granting the plaintiffs in error a new trial, for this court to do so, would be a plain usurpation of the functions of the jury.

In 12 Cyc. pp. 906, 907, 908, we find:

> "It is difficult to formulate a general rule stating the extent to which appellate courts will pass upon the weight and sufficiency of evidence and reverse because of an insufficiency of evidence, but the general rule seems to be that where there is material evidence tending to prove defendant's guilt before the jury, and the trial court refuses to set their verdict aside, an appellate court will not reverse the action of both the trial court and the jury; that it will examine the record to see whether there is evidence proper to go to the jury, and upon which a verdict of guilt might reasonably be founded, and, being satisfied on that point, will refuse to interfere, whatever may be its own opinion of the weight or preponderance of the evidence. If, however, the verdict of the jury is altogether unsupported by any evidence whatever, or if it is against the evidence and every proper inference which is reasonably

deducible therefrom, the judgment will be reversed by the appellate court."

It is earnestly contended that the court protected the plaintiff's in error in their rights at every step of the trial and that at the conclusion of the testimony, if any errors were committed during the trial, they were completely cured by the lengthy and thorough instructions to the jury relative to the rights of, and consideration due to each defendant; and that the jury upon proper instructions and upon competent testimony found each of the plaintiffs in error guilty of each count in the information; and that the writ of the plaintiffs in error should be dismissed and the judgment and sentence be affirmed.

AS TO THE PLAINTIFF IN ERROR, PAPPAS

Plaintiff in Error Pappas has filed a brief where assigns certain assignments which are generally covered in this brief as to Ferguson and Thompson. There is no argument made in his brief in support of his assignments and we do not deem it wise to burden the court with a fuller explanation of the facts than have already been set forth. The wierd and rambling story of this special deputy sheriff is sufficient to convict him. His greed for filthy lucre has led him from an honorable path into the

path of crime and now he wishes to hide himself under the shield of law and order. The entire record discloses page by page his business to be bootlegging instead of an honorable occupation. The jury heard the evidence; the contention of the plaintiff in error, Pappas was fully and fairly covered by the court's instructions and the verdict of the jury stamps his statements as untrue. If there is anyone guilty of the violation of law in this case it is the plaintiff in error. The Government's witnesses demonstrated conclusively that he was the moving party in the transaction and that his integrity was so established that even his co-defendants did not deem him worthy of trust. It may be said in conclusion that when thieves fall out the just men get their dues, and in this case the plaintiff in error Pappas and his co-defendants were so busy trying to convict the others and save themselves that they lost sight of the fact that they were on trial and told the jury the truth.

The Government contends that the writ of error should be dismissed and that the judgment and sentence should be affirmed.

Respectfully submitted,

THOS. P. REVELLE,
United States Attorney,
CHARLES P. MORIARTY,
Special Assistant United States Attorney,
J. W. HOAR,
Assistant United States Attorney,
Attorneys for Defendant in Error.

No. 4033

United States
Circuit Court of Appeals
For the Ninth Circuit.

ELIZABETH HOUSTON, as sole beneficiary under the will of Otho S. Houston, deceased, and as Executrix of the Estate of Otho S. Houston, deceased,

Plaintiff in Error,

vs.

J. M. ROSBOROUGH,

Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court, for the Southern District of California, Southern Division.

FILED

Parker, Stone & Baird Co., Law Printers, 232 New High St., Los Angeles.

No.

United States
Circuit Court of Appeals
For the Ninth Circuit.

ELIZABETH HOUSTON, as sole beneficiary under the will of Otho S. Houston, deceased, and as Executrix of the Estate of Otho S. Houston, deceased,

Plaintiff in Error,

vs.

J. M. ROSBOROUGH,

Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court, for the Southern District of California, Southern Division.

Parker, Stone & Baird Co., Law Printers, 232 New High St., Los Angeles.

INDEX.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

PAGE

Affidavit of Service 5
Answer 32
Assignment of Errors 63
Bond 72
Citation 2
Clerk's Certificate to Judgment Roll 63
Complaint 7
Demurrer 28
Demurrer to Answer 40
Findings of Fact and Conclusions of Law 47
Judgment 61
Minutes 43
Names and Addresses of Attorneys 1
Notice of Presentation of Findings 45
Opinion 67
Order Overruling Demurrer 31
Order Overruling Demurrer 42
Petition for Writ of Error 70
Praecipe 76
Summons 26
Writ of Error 3

Names and Addresses of Attorneys.

For Plaintiff in Error:

LUCIUS K. CHASE, Esq., Title Insurance Building, Fifth and Spring Sts., Los Angeles, California.

For Defendant in Error:

WESTALL and WALLACE and R. M. FULTON, Esqs., Trust & Savings Building, Los Angeles, California.

United States of America, ss.

To J. M. ROSBOROUGH and to WESTALL & WALLACE, his attorneys: Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit of Appeals for the Ninth Circuit, to be held at the City of San Francisco, in the State of California, on the 9th day of May, A. D. 1923, pursuant to a Writ of Error filed and entered in the Clerk's Office of the District Court of the United States, in and for the Southern District of California, in that certain suit, wherein Elizabeth Houston, as sole beneficiary under the will of Otho S. Houston, deceased, and as Executrix of the Estate of Otho S. Houston, deceased, is plaintiff in error, and you are defendant in error to show cause, if any there be, why the judgment rendered against the said plaintiff in error in the said Writ of Error mentioned, should not be corrected, and speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable Benjamin F. Bledsoe United States District Judge for the Southern District of California, this 14th day of April, A. D. 1923, and of the Independence of the United States, the one hundred and forty-seventh

Bledsoe

U. S. District Judge for the Southern District of California.

[Endorsed]: 757 Civ. IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE

NINTH CIRCUIT ELIZABETH HOUSTON, as sole beneficiary under the will of Otho S. Houston, deceased, and as Executrix of the Estate of Otho. S. Houston, deceased, Plaintiff in Error *vs.* J. M. ROSBOROUGH Defendant in error. Citation Service of the within citation admitted this 17th day of April, 1923. Westall & Wallace By Joseph F. Westall, attorney for defendant in error. FILED APR 25, 1923 CHAS. N. WILLIAMS, Clerk By R. S. ZIMMERMAN, Deputy Clerk.

United States of America, ss.

The President of the United States of America

To the Judges of the District Court of the United States, for the Southern District of California, GREETING:

Because in the record and proceedings, and also in the rendition of the judgment of a plea which is in the said District Court, before you between J. M. Rosborough, Plaintiff, and ELIZABETH HOUSTON, as sole beneficiary under the will of Otho S. Houston, deceased, and as Executrix of the Estate of Otho S. Houston, deceased, defendant, a manifest error hath happened, to the great damage of the said defendant as by her complaint appears, and it being fit that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and pro-

ceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at the City of San Francisco, in the State of California, on the 9th day of May, 1923, next, in the said United States Circuit Court of Appeals, to be there and then held, that the record and proceedings aforesaid be inspected, the said United States Circuit Court of Appeals may cause further to be done therein to correct that error, what of right and according to the law and custom of the United States should be done.

WITNESS, the HON. William Howard Taft, Chief Justice of the United States, this 10th day of April in the year of our Lord one thousand nine hundred and Twenty-three and of the Independence of the United States the (SEAL) one hundred and forty-seventh.

Chas N Williams

Clerk of the District Court of the United States of America, in and for the Southern District of California.

By R. S. ZIMMERMAN

Deputy Clerk.

The above writ of error is hereby allowed.

Bledsoe

Judge.

I hereby certify that a copy of the within Writ of Error was on the 10th day of April, 1923, lodged in the office of the Clerk of the said United States Dis-

trict Court, for the Southern District of California, Southern Division, for said Defendants in Error.

Chas N Williams
Clerk of the District Court of the United States for the Southern District of California.
By R S Zimmerman
Deputy Clerk.

[Endorsed]: United States Circuit Court of Appeals *for the* NINTH CIRCUIT ELIZABETH HOUSTON, as sole beneficiary under the will of Otho S. Houston, deceased, and as Executrix of the Estate of Otho S. Houston, deceased, *Plaintiff - - in Error vs.* J. M. ROSBOROUGH, *Defendant - - in Error* Writ of Error Filed April 10—1923 Chas N Williams, Clerk R S Zimmerman Deputy.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

- - - - -

ELIZABETH HOUSTON, as sole beneficiary under the will of Otho S. Houston, deceased, and as Executrix of the Estate of Otho S. Houston, deceased,	
Plaintiff in error	AFFIDAVIT OF SERVICE OF WRIT OF ERROR.
-vs-	
J. M. ROSBOROUGH	
Defendant in Error.	

- - - - - - - - -

STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES)

ALAN NICHOLS being sworn says: I am and was at the time of the service of the Writ of Error in the above entitled action, a citizen of the United States, over the age of eighteen years, and not a party to the within entitled action; I personally served the said Writ of Error on Westall and Wallace, attorneys for defendant in error, J. M. Rosborough, by delivering to and leaving with said Westall and Wallace, personally, on the 17th day of April, 1923, in the County of Los Angeles, State of California, a copy of the said Writ of Error.

Alan Nichols

Subscribed and sworn to before me this 25th day of April, 1923.

(Seal) Anna S. Lewis
Notary Public in and for the County of Los Angeles, State of California.

[Endorsed]: No. 757 Civ. Dept.... IN THE UNITED STATES CIRCUIT COURT of appeals FOR THE NINTH CIRCUIT. ELIZABETH HOUSTON, as sole beneficiary under the will of Otho S. Houston, deceased, and as Executrix of the Estate of Otho S. Houston, deceased. Plaintiff in error vs. J. M. Rosborough Defendant in error. AFFIDAVIT OF SERVICE *or* WRIT OF ERROR. Filed Apr. 25, 1923. Chas. N. Williams, Clerk By R. S. Zimmerman Deputy Clerk LUCIUS K. CHASE Attorney for Plaintiff in Error 441-443 Title Insurance Building LOS ANGELES CALIFORNIA

IN THE DISTRICT COURT OF THE UNITED STATES SOUTHERN DISTRICT OF CALIFORNIA, SOUTHERN - DIVISION.

- - - - - o - - - - -

J. M. Rosborough, Plaintiff,	)	
- vs -	)	
ELIZABETH HOUSTON, as sole beneficiary under the will of Otho S. Houston, deceased, and as Executrix of the Estate of the said Otho S. Houston, deceased, Defendant.	)	No. 757. At Law

- - - - - o - - - - -

COMPLAINT FOR DECEIT

Plaintiff complains and alleges:

I.

That he (plaintiff) is a citizen of the United States and of the State of Texas, residing in the town of Victoria, county of Victoria, State of Texas;

II.

That defendant Elizabeth Houston, sued as sole beneficiary under the will of Otho S. Houston, deceased, and as executrix of the estate of the said Otho S. Houston, deceased, is a citizen of the United States of America and of the State of California, and a resident and inhabitant of the Southern Division of the Southern District of California, residing in the City of Los Angeles, county of Los Angeles, and State of California;

III.

That this is an action of a civil nature at law where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of Three Thousand ($3,000.00) Dollars and as set forth in the immediately preceding paragraph hereof, is between citizens of different states.

IV.

That on and prior to the 15th day of November, 1915, plaintiff was the owner of the following described lands and tenements:

> Lot 1, Block "B", Poole and Jones Tract, in the City of Los Angeles, County of Los Angeles, and State of California, as per map recorded in Book 10, Page 194 of Maps, in the Office of the County Recorder of said County,

which said lands and tenements then stood of record in the name of Edwin S. Crawford and Carrie R. Crawford, respectively the son-in-law and daughter of plaintiff, who held the same in trust for plaintiff, together with all improvements thereon, and which, at the time of the filing of this complaint and at all times hereinbefore mentioned, were worth, to-wit, the sum of Eight Thousand ($8,000.00) Dollars, and the rental value of which was Sixty ($60.00) Dollars per month.

V.

That on or about the 27th day of October, 1915, the said Otho S. Houston, since deceased, offered to purchase said premises in the immediately preceding paragraph in this complaint described, and in order to induce plaintiff to convey same to the said Otho S.

Houston, offered to transfer or assign to plaintiff a certain promissory note, which, together with all endorsements thereon, is in the words and figures following, to-wit:

$2.00 U. S. I. R. Stamps cancelled.

Note No. 1.

Los Angeles, California, Jan. 30, 1915. $9904.00

Ten years after date, I promise to pay to Otho S. Houston, or order the sum of Nine Thousand, Nine Hundred and four ($9904) Dollars, for value received, with interest thereon from date, until paid, at the rate of six per cent per annum, the interest payable semi-annually as it accrues, both principal and interest payable at Fort Worth, Texas. This note is given in part payment for a certain lot or parcel of land, lying and being situated in Crane County, Texas, 640 acres of land, more or less and more fully described as Section No. 13, Block No. 1, Certificate 40/4753 Grantee H. and T. C. Ry. Co. and the east half of Section No. 14 in Block No. 1, Certificate 40/4753, Grantee H. and T. C. Ry. Co. being 320 acres on which said real estate the vendor's lien is hereby expressly acknowledged by the maker hereof and retained by the payee for the better security of this note. All past due interest on this note shall bear interest from maturity thereof, until paid at the rate of ten per cen— per annum. It is understood and agreed that failure to pay this note, or any installment of interest thereon when due, shall at the election of the holder of them, or any of them, mature all notes this day given by me to said Otho S. Houston, in payment for said property. And it is

hereby specially agreed, that if this note is placed in the hands of an attorney for collection, or if collected by suit, or thorugh the Probate Court, I agree to pay ten per cent additional on the principal and interest due, as attorney's fees.

(Signed) J A. Stroud

Lst. Payment $3872.00 cash (Real Estate)
Note No. 1 9904.00—ten years
Assumed on
E. half Sec. 13 624.00—due in 30 years at 3% to
Containind 320 ———— state of Texas
acres $14,400.00

Endorsed as follows:

Pay to the order of J. M. Rosborough Without recourse on me"

Otho S Houston

memo

Int to July 30# 1915 $297.12

and also offered to assign and transfer to plaintiff a certain Deed of Trust, dated on the 30th day of January, 1915, securing said promissory note, which said Deed of Trust was recorded on the 4th day of February, 1915, in Volume 2, at page 413 of Deed of Trust Records of Crane County, Texas, and said Deed of Trust is in the following words and figures, to-wit:

STATE OF CALIFORNIA
COUNTY OF LOS ANGELES

KNOW ALL MEN BY THESE PRESENTS: That J. A. Stroud of the County of Los Angeles, in the State of California, for and in consideration of the sum of Ten Dollars to me paid by W. L. Smallwood

of the County of Tarrant, in the State of Texas, the receipt of which is hereby acknowledged, have Sold, and by these presents do Sell, Transfer, Convey and confirm unto the said W. L. Smallwood, trustee, and to his successors in this Trust, the following described property, to-wit:

> Being all of Section No. 13, Block No. 1, Certificate No. 40/4753 H. and T. C. Ry. Co. survey, containing 640 acres more or less; also the east half of section No. 14, in Block No. 1, Certificate 40/4753 Grantee H. and T. C. Ry. survey, containing 320 acres of land more or less.

Together with all and singular the rights, members, hereditaments and appurtenances to the same in any manner belonging or appertaining.

TO HAVE AND TO HOLD, all and singular, the property above described unto the said W. L. Smallwood, Trustee, or his substitute forever. And I do by these presents bind myself, my heirs, executors and administrators to Warrant and Forever Defend, all and singular, the said property unto the said W. L. Smallwood, Trustee or his substitute herein, against the claim or claims of any or all persons whomsoever claiming or to claim the same or any part thereof.

THIS CONVEYANCE HOWEVER IS INTENDED AS A TRUST, for the better securing of OTHO S. HOUSTON of the County of Los Angeles, State of California, in the payment of one certain promissory note, of which the following is a substantial copy. Note. No. 1 dated Jan. 30, 1915 for $9904 due ten years after date, payable to order of Otho S. Houston

at Fort Worth, Texas with interest from date at six per cent payable semi-annually.
bearing interest at the rate of 6 per cent per annum from date Upon payment of which said promissory note according to its face and tenor, being well and truly made, then, in such case, this conveyance is to become null and of no further force and effect, and shall be released at the cost and expense of the said J. A. Stroud But in case of failure or default in the payment of said promissory note, together with the interest thereon accrued, according to the terms and face, at the maturity of the same, then, in such event, said W. L. Smallwood, Trustee, is by these presents fully authorized and empowered, and it is made his special duty, at the request of the said Otho S. Houston or other holder of said note, at any time made after the maturity of said promissory note to sell the said above described property to the highest bidder, for cash, at public outcry, in front of the Court House door of said Crane or Ector County, State of Texas, on the first Tuesday of any month, between the hours of 10 o'clock a. m. and 4 o'clock p. m. first giving notice of the time, place and terms of sale for at least twenty days successively next before the day of sale, by posting up written or printed notices of such sale at three public places in the County of Crane, or Ector State of Texas, one of which shall be at the Court House door of said County, and by giving such other notice as is or may be required by law, and after said sale as aforesaid, to make to the purchaser or purchasers thereof a good and sufficient deed in law to the property so sold with the

usual covenants and warrants, and to receive the proceeds of said sale, and the same to apply to the payment of said note, the interest thereof accured, and the expenses of executing said trust, including 10 per cent commission to said Trustee, holding the remainder thereof subject to the order of J. A. Stroud, the said grantor herein. It is expressly agreed that the recitals in the conveyance to the purchaser shall be full evidence of the truth of the matters therein stated, and all prerequisites to said sale shall be presumed to have been performed; and it is hereby specially provided that should the said W. L. Smallwood, Trustee, from any cause whatever, fail or refuse to act, or become disqualified from acting as such Trustee, then the said Otho S. Houston, or other holder shall have full power to appoint a substitute, in writing, who shall have the same powers as are hereby delegated to the said W. L. Smallwood, Trustee, and I by these presents fully and absolutely ratify and confirm any and all acts which the said W. L. Smallwood, Trustee or his substitute as herein provided, may do in the premises by virtue hereof.

Witness my hand this 30th day of January, A. D. 1915.

J A. Stroud

State of California
County of Los Angeles

Before me, Ida M. Greatrake, a Notary Public in and for Los Angeles County, California, on this day personally appeared J. A. Stroud, known to me to be the person whose name is subscribed to the foregoing instrument, and acknowledged to me that he executed

the same for the purposes and consideration therein expressed.

Given under my hand and seal of office this 30th day of January, 1915.

Ida M. Greatrake
Notary Public in and for Los Angeles Co California.
(SEAL)

CERTIFICATE OF RECORD

THE STATE OF TEXAS)
COUNTY OF ECTOR) I, P. A. Higgins Clerk of the County Court in and for said County, do hereby certify that the foregoing Deed of Trust dated the 30th day of Jany A. D. 1915, together with its certificates of authentication, was filed for record in my office the 4 day of Feby A. D. 1915, at 2 o'clock P. M., and duly recorded on the 4 day of Feby A. D. 1915, in Deed of Trust records of Crane County, in volume 2 on page 413

WITNESS MY HAND AND OFFICIAL SEAL, at my office in Odessa, Texas, this 4 day of Feby A. D. 1915.

P. A. Higgins
(SEAL) Clerk, County Court, Ector County, Texas
(L. S.) By.....deputy

Endorsed:

DEED OF TRUST J. A. Stroud to Otho S. Houston Section No. 13 East half 14 Block No. 1 Cert. 40/4753 Crane County, Tex.

Filed for Record this 4 day of Jany 1915 at 2 o'clock P. M.

P. A. Higgins
County Clerk, Ector County, Texas

VI.

That further to induce plaintiff to accept said transfer and assignment of said promissory note and said trust deed, as a consideration for the conveyance of the premises described in paragraph IV, of this complaint, said Otho S. Houston, deceitfully, falsely, and fraudulently stated and represented to said plaintiff that said land described in said trust deed and securing the payment of said promissory note was of great and substantial value, and was of such a value as to afford ample security for the payment of said note and any interest that might accrue thereon, that is to say, was worth in the aggregate the sum of between Fifteen Thousand ($15,000.00) and Twenty Thousand ($20,000.00) Dollars; that plenty of water suitable for the irrigation of said land for agricultural purposes was available, and that said land could be so irrigated directly from the Pecos River (the course of which lies in approximately a semi-circle around said land); that a Buena Vista Water Company, furnished water for irrigation to lands on the side of said Pecos River opposite, but adjacent to the lands described in said trust deed; that such lands on said opposite side of said Pecos River so supplied with water for irrigation purposes were selling for Sixty and Seventy-five Dollars per acre; that water could be pumped from the river directly onto this land, and thus irrigated it would be as productive, and as valuable as lands illustrated and described in a prospectus or folder purporting to illustrate and describe said Pecos River irrigated lands then and there exhibited by the said Hous-

ton to Edwin S. Crawford, who was then and there acting as agent for plaintiff and who thereafter communicated such representations to this plaintiff; that the J. A. Stroud mentioned in the trust deed hereinbefore set forth had paid to him, the said Otho S. Houston, as the first installment of the purchase price of said land, real estate then well worth Thirty-eight Hundred and Seventy-two ($3,872.00) Dollars, and in normal times worth Four Thousand ($4,000.00) Dollars in addition thereto giving him the promissory note secured by trust deed hereinbefore set forth and had paid the installment of interest due July 30, 1915, under the terms of said note; and that said land was well worth all that said Stroud had paid for it and that if he, the said Otho S. Houston, was then in Texas and near the land he did not know that he would have sold it at the price as aforesaid stated and represented by him to have been paid for the same by the said J. A. Stroud.

VII.

That in truth and in fact the representations in the immediately preceding paragraph of this complaint set forth as having been made by the said Otho S. Houston, were each and all absolutely untrue, deceitful, and fraudulent, as he, the said Otho S. Houston, then and there well knew, and the plaintiff did not know, and that he, the said Otho S. Houston, made the same for the purpose and with the intent of deceiving plaintiff and of defrauding plaintiff out of his said lands and tenements hereinbefore in paragraph IV of this complaint described and did deceive plaintiff to his

great injury, as hereinafter more specifically set forth; and said Otho S. Houston then and there well knew and plaintiff did not know that said land described in said trust deed and securing the payment of said promissory note was not of great and substantial value, but was of very slight and insignificant value, and was not of such value as to afford ample security for the payment of said note and any interest that might accrue thereon; but was, on the contrary, grossly insufficient as a security for the amount of said note, and was not worth in the aggregate or at all the sum of between Fifteen Thousand ($15,000.00) Dollars and Twenty Thousand ($20,000.00) Dollars; but was not worth to exceed One Thousand ($1,000.00) Dollars; that it was not true that either plenty or sufficient water suitable for irrigation of said land for agricultural purposes was available in said Pecos River; on the contrary, except in times of freshets or floods, there was not sufficient water in said Pecos River for the irrigation of said lands and the water direct from said Pecos River (except possibly in times of freshets or floods) was so extremely salty and possessed of much alkali as to be totally unsuitable and unfit for irrigation for agricultural purposes; that the J. A. Stroud mentioned in the hereinbefore described trust deed had not paid to him, the said Otho S. Houston, as the first installment of the purchase price of said land, real estate then well worth thirty-eight Hundred Seventy-two ($3,872.00) Dollars, in addition thereto giving him a promissory note secured by trust deed hereinbefore described; that on the contrary, while it was true that

the said J. A. Stroud did exchange or transfer to the said Houston, as a partial consideration for the land described in said trust deed, the following described lands:

> All that certain tract or parcel of land lying and being situate in Reeves County, Texas, and being all of Section No. 269, Block No. 11, Certificate No. 1139, G. H. & S. A. Ry Co Survey, and containing 640 acres of land,

said last described lands were not of the value of Three Thousand Eight Hundred and Seventy-two ($3,872.00) Dollars or Four Thousand ($4,000.00) Dollars, or any other sum or value exceeding the sum of Four Hundred and Eighty ($480.00) Dollars which the said Houston then well knew, and that said J. A. Stroud paid no value whatever for said land other than the promissory note hereinbefore described and land worth not exceeding Four Hundred and Eighty ($480.00) Dollars and that it is not true that said land was worth all or any substantial part of the pretended price the said J. A. Stroud had paid for it, but in truth and in fact was worth not to exceed in value the sum of One Thousand ($1,000.00) Dollars, as hereinbefore set forth, and that it was not true that the said Stroud had paid the installment of interest due July 30, 1915, under the terms of said note, or that the said Stroud had paid any part thereof or any of the accrued interest on said note.

VIII.

That he (plaintiff) had long prior to the times hereinbefore mentioned in this complaint been intimately

acquainted with near relatives of the said Otho S. Houston, and had through such relationship acquired a high regard for their veracity, honesty, and fairness of dealing, and was of the belief that no member of the Houston family would deceive and defraud him and that, implicitly relying upon the said deceitful, false, and fraudulent representations, and believing the same to be true, and, being partially influenced by his said former friendly relations with the members of said Houston family, the plaintiff accepted the offer of the said Otho S. Houston, and on or about the 15th day of November, 1915, caused to be made, executed and delivered to the said Otho S. Houston by his said son-in-law, Edwin S. Crawford, and plaintiff's said daughter, Carrie R. Crawford, a deed to the premises first above described conveying the title thereto in fee to the said Otho S. Houston and thereupon let the said Otho S. Houston into possession of said premises, receiving from him as consideration therefor the promissory note and deed of trust mentioned and described in paragraph V of their complaint, together with the assignment in writing of the said Otho S. Houston thereof.

IX.

That the said deceased Otho S. Houston, died on the 8th day of May, 1917, in the County of Los Angeles, State of California, leaving a will designating the above named defendant, Elizabeth Houston as Executrix of his Estate, in which will the said Elizabeth Houston was named as the sole devisee, legatee, and beneficiary thereof; that said will was on the 19th day of June,

1917, admitted to probate in the said County of Los Angeles, and on the same date defendant Elizabeth Houston was by the Superior Court of the State of California, County of Los Angeles, appointed Executrix of the said Estate; that on the 3rd day of July, 1917, said Elizabeth Houston qualified as such Executrix, and that she has been at all times since said last mentioned date up to the present time, and now is the duly qualified and acting executrix of said Estate as aforesaid.

X.

That neither the principal of said promissory note set forth in paragraph V of this complaint nor any part thereof has been paid, and though often demanded of the said J. A. Stroud neither the accrued interest nor any part thereof has been paid, and plaintiff is informed and believes and *therefor* alleges that the said J. A. Stroud is financially irresponsible and unable to pay said interest and has no reasonable prospects of paying the principal nor any part thereof when the same shall become due, and that said note except to the extent of the value of the land conveyed in trust as security, as aforesaid, is entirely worthless and of no value, and the reasonable court costs, expenses, and attorneys fees necessary to foreclose said trust deed will amount to the sum of Three Hundred Dollars ($300.00).

XI.

That by reason of said false, fraudulent, and deceitful representations of defendant's testator, the said Otho S. Houston, deceased, plaintiff has suffered dam-

age and injury to the extent of the difference in value between the lands and tenements described, respectively, in paragraphs IV and V of this complaint, namely, in the sum of Seven Thousand ($7,000.00) Dollars, together with the sum of Three Hundred ($300.00) Dollars, reasonable court costs, expenses, and attorneys fees necessary to foreclose said trust deed, and secure title to the land described in said trust deed or the value thereof at judicial sale to third person; and has been damaged in the further sum of Two Thousand Seven Hundred and Sixty ($2,760.00) dollars rental value of the premises described in paragraph IV of this complaint from said 15th day of November, 1915, to the date of filing this complaint.

XII.

The land described in paragraph V of this complaint, securing payment of said promissory note is not easily accessible, either to plaintiff's home in Texas, or to his place of residence in California, being about 600 miles distant by rail and automobile from plaintiff's home in Texas, and an inspection of said land or an investigation of its value would have required considerable time and involved great expense; and after the assignment of said promissory note and deed of trust, as set forth in paragraph VIII hereof, until the 25th day of March, 1919, plaintiff did not have occasion to visit the locality in which said land is situated and had no opportunity to inspect the same, and from the time of said assignment until the 25th day of February, 1919, plaintiff had no notice or knowledge of any fact or thing which did or should have led him to believe

that the statements and representations of the said Otho S. Houston, deceased, set forth in paragraph VI of this complaint were not true, and during all said time plaintiff continued to rely upon said statements and representations believing them to be true; that after said 15th day of November, 1915, the said Houston and the said Stroud, continued, at the times and in the manner hereinafter more specifically set forth, with intent to further mislead, deceive, and defraud this plaintiff, and to prevent plaintiff from discovering the falsity of the representations in paragraph VI of this complaint set forth and the fraud which as aforesaid, had been practised by said Houston upon this plaintiff, with full knowledge of their falsity, to deceitfully make other untrue, false, and fraudulent representations and to do and perform other fraudulent acts calculated and tending to and which did in fact deceive plaintiff and prevent him from discovering the fraud which had as aforesaid been practised by said Houston upon him; that such false and fraudulent representations consisted of the following statements and representations in the following described letters:

First: A letter, dated the 20th day of December, 1915, signed by the said Houston, directed to this plaintiff and received by plaintiff some time during the latter part of December, 1915, in which the said Houston stated among other things that the man owning the land adjoining the land described in said trust deed would not take less than Twenty-five ($25.00) Dollars an acre for his said land and that if he (the said Houston) lived in Texas he would like to buy the

land described in said trust deed at that price, that is to say, Twenty-five Dollars ($25.00) per acre;

Second: What purported to be a copy of a letter dated December 20, 1915, from the said Houston to the said Stroud, which was enclosed with the letter described in the immediately preceding paragraph of this complaint, which said letter contained the following statement: "would think that you would be giving up a good proposition, as you have formerly stated in your letters to me that you thought this land would be worth $50.00 per acre, and if you can manage to hold onto it you certainly will do well. Mr. Cowan, who owns the land next door to you, it is true, would sell his land for $25.00 per acre, but it looks as if you might make money by holding onto it and raising the money for the interest."

Third: A letter signed by the said Houston, bearing date the 3rd day of January, 1916, and addressed to plaintiff and received by plaintiff in the early part of January, 1916, in which he (said Houston) enclosed what purported to be a part of a letter from the said Stroud asking the said Houston to get plaintiff to extend the time for payment of interest, and in which the said Stroud expressed a desire to hold onto the land;

Fourth: A letter written and signed by the said Stroud addressed to plaintiff herein and dated the 17th day of January, 1916, and received by plaintiff some time in the latter part of January, 1916, in which the said Stroud, among other things stated that he (said Stroud) could make said land sell for a hundred dollars

per acre, and that it would not cost him (Stroud) more than ten or twelve dollars per acre to do so;

Fifth: In a letter dated June 10, 1917, addressed to plaintiff herein and signed by the said Stroud in which he (Stroud) stated among other things that he was sorry he could not keep said land paid up as he believed some day it would be valuable land.

That on said 25th day of February, 1919, plaintiff was informed by persons whom he believed to be responsible and well informed that said land was grossly inadequate as a security for the payment of said promissory note, and, acting upon said information, on, to-wit, the 25th day of March, 1919, he personally visited said land and investigated its value and at that time first discovered that the statements and representations of the said Otho S. Houston, deceased, set forth in paragraph VI of this complaint were not true, but were false, fraudulent, and deceitful, as hereinbefore in paragraph VII of this complaint alleged.

Until the said discovery in March, 1919, of the great variance between the value of the said Texas land and the value as represented by said Otho S. Houston, as aforesaid, plaintiff had no reason to suspect that the first cash payment represented by Houston to have been made on said land by said Stroud was not made as represented by said Houston.

WHEREFORE, Plaintiff prays judgment against the said defendant for the sum of Ten Thousand and

Sixty ($10,060.00) Dollars, together with costs of this suit.

WESTALL AND WALLACE
By Joseph F. Westall
and R. M. Fulton
Attorneys for Plaintiff.

STATE OF CALIFORNIA,)
(ss.
COUNTY OF LOS ANGELES)

J. M. Rosborough being by me first duly sworn, deposes and says: that he is the plaintiff in the above entitled action, that he has heard read the foregoing petition and knows the contents thereof; and the same is true of his own knowledge, except as to the matters which are therein stated to be upon his information or belief, and as to those matters that he believes it to be true.

J. M. Rosborough.

Subscribed and sworn to before me this 12th day of September, 1919.

(Seal) HAZEL P. FENLON
Notary Public in and for the County of Los Angeles, and State of California.

(ENDORSED) No. 757 Law. In the District Court of the United States in and for the Southern District of California, Southern Division. J. M. ROSBOROUGH, Complainant, vs. Elizabeth Houston, Defendant. COMPLAINT FOR DECEIT. Filed Oct. 10, 1919, CHAS. N. WILLIAMS, Clerk, by R. S. Zimmerman, Deputy Clerk. Westall and Wallace, Attorneys at Law, suite 516 Trust & Savings Bldg., Los Angeles, F5683, Attorneys for Plaintiff.

UNITED STATES OF AMERICA.
District Court of the United States
SOUTHERN DISTRICT OF CALIFORNIA.

J. M. ROSBOROUGH,
Plaintiff,
vs.
ELIZABETH HOUSTON, etc
Defendant.
} At Law No. 757

Action brought in the said District Court, and the Complaint filed in the office of the Clerk of said District Court, in the City of Los Angeles, County of Los Angeles, State of California.

The President of the United States of America, Greeting:

To ELIZABETH HOUSTON, as sole beneficiary under the will of Otho S. Houston, deceased, and as Executrix of the Estate of the said Otho S. Houston, deceased.

You are hereby required to appear in an action brought against you by the above-named plaintiff, in the District Court of the United States, in and for the Southern District of California, Southern Division, and to file your plea, answer or demurrer, to the complaint filed therein (a certified copy of which accompanies this summons), in the office of the Clerk of said Court in the City of Los Angeles, County of Los Angeles, within twenty days after the service on you of this summons, or judgment by default will be taken against you, and you are hereby notified that unless you appear and plead, answer or demur, as herein required, the plaintiff will take judgment for any money

or damages demanded in the complaint as arising from contract or will apply to the Court for any further relief demanded in the complaint.

WITNESS, the Honorable BENJAMIN F. BLEDSOE, Judge of the District Court of the United States, in and for the Southern [SEAL] District of California, this 10th day of October, in the year of our Lord one thousand nine hundred and nineteen and of our Independence the one hundred and forty fourth.

Chas. N. Williams
Clerk.
By R. S. ZIMMERMAN
Deputy Clerk.

UNITED STATES MARSHAL'S OFFICE, }
SOUTHERN DISTRICT OF CALIFORNIA. }

I HEREBY CERTIFY, that I received the within writ on the 13th day of October, 1919, and personally served the same on the 17th day of October, 1919, by delivering to and leaving with Elizabeth Houston, said defendant named therein, personally, at the County of Los Angeles in said District, a certified copy thereof, together with a copy of the Complaint, certified to by Chas. N. Williams attached thereto.

C. T. Walton
U. S. Marshal.
By J. S. Bassett
Deputy.

LOS ANGELES,
Oct. 17th, 1919.

[Endorsed]: Marshal's Civil Docket No. 3861. Law. *No.* 757 Civil U. S. District Court SOUTHERN DISTRICT OF CALIFORNIA J. M. Rosborough, *vs.*

Elizabeth Houston, Summons Westall and Wallace *Plaintiff's Attorney* Filed Nov 5 1919 Chas N William Clerk By R S Zimmerman Deputy Clerk

IN THE DISTRICT COURT OF THE UNITED STATES SOUTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION.

-----o-----

J. M. Rosborough,

Plaintiff,

vs.

ELIZABETH HOUSTON, as sole beneficiary under the will of Otho S. Houston, deceased, and as Executrix of the Estate of the said Otho S. Houston, deceased,

Defendant.

At Law No. 757

-----o-----

DEMURRER

Comes now the above entitled beneficiary, Elizabeth Houston, as sole beneficiary under the will of Otho S. Houston, deceased, and as Executrix of the Estate of the said Otho S. Houston, deceased, and demurs to the complaint of the above entitled Plaintiff, on file herein, for:

I.

That said complaint does not state the cause of action as against Elizabeth Houston as sole beneficiary under the will of Otho S. Houston, deceased.

II.

That said complaint does not state the cause of action against Elizabeth Houston as Executrix of the Estate of the said Otho S. Houston, deceased.

III.

That there is a misjoinder of parties defendant in that there is joined, as defendants herein in an action of deceit, an action against Elizabeth Houston as sole beneficiary under the Will of Otho S. Houston, deceased, she not being privy or a party to the deceit, and an action against Elizabeth Houston as Executrix of the Estate of the said Otho S. Houston, deceased, for an alleged deceit practiced by the said Otho S. Houston.

IV.

That several causes of action have been improperly united in that there has been united therein a cause of action against Elizabeth Houston as Executrix of the Estate of Otho S. Houston, deceased, for an alleged fraud, alleged to have been perpetrated by said Otho S. Houston, and an action against Elizabeth Houston as sole beneficiary under the Will of Otho S. Houston, deceased, for alleged fraud, alleged to have been perpetrated by the said Otho S. Houston.

V.

That said complaint is ambiguous in that it cannot be determined therefrom whether the said Plaintiff, ever or at all, presented a claim against the Estate of Otho S. Houston to recover from said Estate the amount claimed to be due under said complaint.

VI.

That said complaint is uncertain for the same reason assigned as showing it to be ambiguous.

Lucius K. Chase

ATTORNEY, for Elizabeth Houston, as sole beneficiary under the Will of Otho S. Houston, deceased, and as Executrix of the Estate of the said Otho S. Houston, deceased.

[Endorsed]: No. 757 Dept.... IN THE DISTRICT COURT OF THE UNITED STATES SOUTHERN DISTRICT OF CALIFORNIA SOUTHERN DIVISION J. M. ROSBOROUGH, Plaintiff vs. ELIZABETH HOUSTON, as sole beneficiary under the Will of Otho S. Houston, deceased, and as Executrix of the Estate of the said Otho S. Houston, deceased, Defendant. DEMURRER Service of the within Demurrer admitted this 3rd day of November, 1916. Westall and Wallace by Joseph F. Westall R M Fulton attorneys for plaintiff Filed Nov 3, 1919 Chas. N. Williams, Clerk By R. S. Zimmerman Deputy Clerk. LUCIUS K. CHASE, Attorney for Defendants 441-443 Title Insurance Bldg., Los Angeles, California.

At a stated term, towit: the July, A. D. 1919 Term of the District Court of the United States of America, within and for the Southern Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles, on Monday, the twenty-fourth day of November, in the year of our Lord, One thousand nine hundred and *nineteenth*;

Present: The Honorable Benjamin F. Bledsoe, District Judge.

J. M. Rosborough, Plaintiff,	)	
vs.	)	757 Civil
Elizabeth Houston, etc.,	)	
Defendant.	)	

This cause coming on this day for hearing on defendant's demurrer to the complaint herein; Joseph F. Westall, Esq., appearing as counsel for the plaintiff; Lucius K. Chase, Esq., appearing as counsel for the defendant, and said demurrer having been argued by the respective counsel, and the Court being fully advised in the premises, now orders that said demurrer be and the same hereby is overruled and that defendant be allowed ten days to answer herein.

IN THE DISTRICT COURT OF THE UNITED STATES SOUTHERN DISTRICT OF CALIFORNIA SOUTHERN - DIVISION

----o----

J. M. Rosborough,	)	
	)	
Plaintiff,	)	
	)	
- vs -	)	
	)	
ELIZABETH HOUSTON, as sole beneficiary under the will of Otho S. Houston, deceased, and as Executrix of the Estate of the said Otho S. Houston, deceased.	)	At Law No. 757.
	)	
Defendant.	)	

----o----

ANSWER

Comes now Elizabeth Houston, as sole beneficiary under the Will of Otho S. Houston, deceased, and as Executrix of the Estate of the said Otho S. Houston, deceased, and for answer to the complaint of the Plaintiff on file herein, alleges and denies as follows, to-wit:

I.

Thas she has no information or belief upon the subject sufficient to enable her to answer the same and basing her denial on that ground denies that on or prior to the 15th day of November, 1915, said Plaintiff was the owner of the following described lands and tenements:

> Lot 1, Block "B", Poole and Jones Tract, in the City of Los Angeles, County of Los Angeles, and State of California, as per map recorded in Book 10, Page 194 of Maps, in the Office of the County Recorder of said County;

or that said lands or tenements then stood of record in the name of Edwin S. Crawford and Carrie B. Crawford, or in the name of Edwin S. Crawford or Carrie R. Crawford; or that they or either of them held the same in trust for Plaintiff, with or without the improvements thereon; or that at the time of the filing of said complaint, or at all times thereinbefore mentioned, said lands and tenements were worth the sum of Eight Thousand ($8,000.00) Dollars or that the rental value thereof was Sixty ($60.00) Dollars per month.

II.

That she has no information or belief upon the subject sufficient to enable her to answer the same and placing her denial on that ground denies that on or about the 27th day of October, 1915, the said Otho S. Houston offered to purchase the aforesaid property, or in order to induce Plaintiff to convey same to the said Otho S. Houston or otherwise, offered to transfer or assign to Plaintiff that certain promissory note, set forth in Paragraph V of said complaint; or that said note, together with endorsements thereon, so set forth, is in the words and figures as the same appears in Paragraph V of said complaint; or offered to assign or transfer to Plaintiff a certain Deed of Trust dated on the 30th day of January, 1915, securing said promissory note; or that said Deed of Trust was recorded on the 4th day of February, 1915, in Volume 2, page 413 of Deeds of Trust records of Crane County, Texas; or that said Deed of Trust is in the words and figures as set forth in paragraph V of said complaint.

III.

That she has no information or belief upon the subject sufficient to enable her to answer the same and basing her denial on that ground denies that, to induce Plaintiff to accept said transfer or assignment of said promissory note or said Trust Deed as a consideration for the conveyance of the premises in paragraph IV of said complaint, or at all, said Otho S. Houston deceitfully or falsely or fraudulently stated or represented, or stated or represented at all, to said Plaintiff, that said land described in said Trust Deed and securing

the payment of said promissory note, was of great or substantial value or was of such a value as to afford ample security for the payment of said note or any interest that might accrue thereon; or that it was worth, in the aggregate, the sum of between Fifteen Thousand ($15,000.00) and Twenty Thousand ($20,-000.00) Dollars; or that plenty of water, suitable for the irrigation of said land for agricultural purposes, was available; or that said land could be so irrigated directly from the Pecos River; or that the course of said Pecos River lies in approximately a semi-circle around said land; or that a Buena Vista Water Company furnished water for irrigation to lands on the side of said Pecos River opposite but adjacent to the lands described in said Trust Deed; or that such lands on said opposite side of said Pecos River, so supplied with water for irrigation purposes, were selling for sixty ($60.00) or Seventyfive ($75.00) Dollars per acre; or that water could be pumped from the River directly onto said land; or that thus irrigated it would be as productive or as valuable as lands illustrated or described in a prospectus or folder purporting to illustrate and describe said Pecos River irrigated lands, then or there exhibited by the said Houston to Edwin S. Crawford; or that the said Edwin S. Crawford was then and there acting as agent for Plaintiff, or that he subsequently communicated such representations to Plaintiff; or that the J. A. Stroud mentioned in the Trust Deed, hereinbefore set forth, had paid to him, said Otho S. Houston, as the first installment of the purchase price of said land, real estate then well worth

Thirty-eight Hundred and Seventy-two ($3,872.00) Dollars, or in normal times worth Four Thousand ($4,000.00) Dollars; or, in addition thereto, giving him the promissory note secured by Trust Deed hereinbefore set forth in said complaint; or had paid the installment of interest due July 30, 1915 under the terms of said note; or that said land was well worth all that said Stroud had paid for it; or that if he, the said Otho S. Houston, was then in Texas or near the land, he did not know that he would have sold it at the price as aforesaid stated or represented to him to have been paid for the same by the said J. A. Stroud.

IV.

That she has no information or belief upon the subject sufficient to enable her to answer the same and basing her denial on that ground denies that in truth or in fact the alleged representations set forth in paragraph 6 of said complaint, as having been made by the said Otho S. Houston, or any of said alleged representations, were absolutely untrue or untrue at all, or deceitful, or fraudulent; that at such time the said Otho S. Houston knew that any of said representations were untrue or deceitful or fraudulent; that the said Plaintiff did not, at said time, know that said alleged representations were not true or that the said Otho S. Houston made the same for the purpose or with the intent of deceiving Plaintiff or of defrauding Plaintiff out of his said lands or tenements mentioned in paragraph IV of said complaint; or did deceive Plaintiff to his great injury, or at all; or that said Otho S. Houston then and there well knew, or that the said

Plaintiff did not know, that said lands described in said Trust Deed securing the payment of said promissory note was not of great or substantial value; that it was of very slight or insignificant value; or that it was not of such value as to afford ample security for the payment of said note or any interest that might accrue thereon; that, on the contrary. it was grossly insufficient as a security for amount of said note; was not worth, in the aggregate, or at all, the sum of between Fifteen Thousand ($15,000.00) and Twenty Thousand ($20,000.00) Dollars; or was not worth to exceed One Thousand ($1,000.00) Dollars; it was not true that either plenty or sufficient water, suitable for irrigation of said land for agricultural purposes, was available in said Pecos River; that, on the contrary, except in times of freshets or floods, there was not sufficient water in said Pecos River for the irrigation of said lands; that the water direct from said Pecos River, except in times of freshets or floods, was so extremely salty and possessed of so much alkali as to be totally unsuitable or unfit for agricultural purposes; that the J. A. Stroud mentioned in the hereinbefore described Trust Deed had not paid to him, the said Otho S. Houston, as the first installment of the purchase price of said land, real estate then well worth Thirty-eight Hundred Seventy-two ($3,872.00); that, on the contrary, that the said J. A. Stroud did exchange or transfer to the said Houston, as a partial consideration for the land described in the said Trust Deed, the following described lands:

All that certain tract or parcel of land lying and being situate in Reeves County, Texas, and being

all of Section No. 269, Block No. 11, Certificate No. 1139, G. H. & S. A. Ry. Co. Survey, and containing 640 acres of land;

or that said last described lands were not of the value of Thirty-eight Hundred, Seventy-two ($3,872.00) Dollars or Four Thousand ($4,000.00) Dollars, or any other sum or valuation exceeding the sum of Four Hundred and Eighty ($480.00) Dollars; or that the said Otho S. Houston at said time well knew such fact; that the said J. A. Stroud paid no value whatever for the said land other than the promissory note mentioned in said complaint and said land worth not exceeding Four Hundred and Eighty ($480.00) Dollars; that it is not true that said land was worth all or any substantial part of the pretended price of said J. A. Stroud had paid for it; or in truth or in fact was worth not to exceed in value the sum of One Thousand ($1,000.00) Dollars; that it was not true that the said Stroud had paid the installment of interest due July 30, 1915, under the terms of said note; that it was not true that said Stroud had paid any part thereof or any of the accrued interest on said note.

V.

That she has no information or belief upon the subject sufficient to enable her to answer the same, and basing her denial on that ground denies each and all of the allegations contained in Paragraphs VIII, X, XI and XII of said Complaint;

By way of separate answer to the Complaint of plaintiff on file herein, said defendant alleges:

I.

That the cause of action alleged in said Complaint is barred by the provisions of Section 338 of the Civil Code of Procedure of the State of California;

For a further and separate defense to said cause of action set forth in said Complaint, said defendant further avers:

I.

That no claim was presented to said Executrix, or filed with the Clerk of the Superior Court of Los Angeles County, State of California, within the time allowed by law for the presentation of claims in the matter of said estate, for the payment of the money alleged in said Complaint to be due from said defendant, as Executrix of the Estate of Otho S. Houston, to said plaintiff;

For a further and separate defense to said cause of action set forth in said Complaint, said defendant further avers:

I.

That no claim was presented to said Executrix, or filed with the Clerk of the Superior Court of Los Angeles County, State of California, within the time allowed by law for the presentation of claims in the matter of said estate, to recover damages for the deceit and fraud averred in said Complaint.

Lucius K. Chase

Attorney for said defendant, Elizabeth Houston, as sole Beneficiary under the Will of Otho S. Houston, deceased, and as Executrix of the Estate of the said Otho S. Houston, deceased

STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES)

Elizabeth Houston being by me first duly sworn, deposes and says: that, as sole beneficiary under the Will of Otho S. Houston, deceased, and as Executrix of the Estate of the said Otho S. Houston, deceased, she is the above entitled defendant; that she has read the foregoing answer and knows the contents thereof; and that the same are true of her own knowledge, except as to those matters which she has *avered* and denied upon her information and belief and as to those she believes it to be true.

Elizabeth Houston.

Subscribed and sworn to before me this 29 day of November, 1919.

Myrta J Burns

Notary Public in and for the County of Los Angeles, and State of California.

[Seal]

[Endorsed]: ORIGINAL *No. 757. Dept.....* IN THE DISTRICT COURT OF THE UNITED STATES SOUTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION J. M. ROSBOROUGH *Plaintiff .vs.* ELIZABETH HOUSTON *Defendant* ANSWER *Service of the within* Answer *admitted this* 3rd *day of* Dec. 1919 R M Fulton Westall and Wallace By Joseph F. Westall Attorneys for pltff. Filed Dec 3 1919 Chas N. Williams, Clerk By R S Zimmerman Deputy Clerk LUCIUS K. CHASE *Attorney for* Defendant 441-443 Title Insurance Building LOS ANGELES, CALIFORNIA

IN THE DISTRICT COURT OF THE UNITED STATES SOUTHERN DISTRICT OF CALIFORNIA SOUTHERN DIVISION

----o----

J. M. ROSBOROUGH, Plaintiff, - vs - ELIZABETH HOUSTON, as sole beneficiary under the will of Otho S. Houston, deceased, and as Executrix of the Estate of the said Otho S. Houston, deceased. Defendant.	At Law No. 757

----o----

DEMURRER TO ANSWER

Now comes the above named plaintiff and demurs to the last two sub-divisions (which both, together with a preceding sub-division are designated in said answer by the Roman numeral I) of said answer, namely to the two sub-divisions of defendant's answer beginning at line 12 and ending at line 28, page 6, both inclusive, of said answer (said pretended defenses relating to the non-presentation of a claim to the defendant Executrix) for---

I.

That the same does not state facts sufficient to constitute a defense or defenses to the complaint herein.

II.

That said answer is ambiguous in that it cannot be determined whether the two identically numbered paragraphs referred to relate to the same or different defenses.

III.

That said answer is unintelligible for the reason assigned showing it to be ambiguous.

IV.

That said answer is uncertain for the reason assigned showing it to be ambiguous and unintelligible.

WESTALL AND WALLACE,
By Joseph F. Westall,
Attorneys for Plaintiff.

POINTS AND AUTHORITIES UPON WHICH THE DEMURRENT SHALL RELY

California Code of Civil Procedure, Sec. 1493;
Leverone v. Weakly, 155 Cal. 395;
Hardin v. Sinclaire, 115 Cal. 460, 463.

[Endorsed]; *No.* 757 At Law IN THE District Court OF THE UNITED STATES In and for the Southern District of California SOUTHERN DIVISION J. M. ROSBOROUGH *Complainant vs.* ELIZABETH HOUSTON, et al *Defendants* DEMURRER TO ANSWER *Received copy of the withiu* Demurrer *this* 11th *day of* December 1919 Lucius K Chase *Attorney for* Defendant. Filed Dec 11 1919 Chas. N. Williams. Clerk By R. S. Zimmerman Deputy Clerk Lucius K Chase *Attorney for* Defendant. WESTALL AND WALLACE ATTORNEYS AT LAW SUITE 516 TRUST & SAVINGS BLDG. LOS ANGELES F 5683 Main 8508 *Attorneys for* Plaintiff

At a stated term, towit: the July A. D. 1919, Term of the District Court of the United States of America, within and for the Southern Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles, on Monday, the twenty-second day of December, in the year of our Lord one thousand nine hundred and nineteen;

Present: The Honorable Benjamin F. Bledsoe, District Judge.

J. M. Rosborough,	)	
Plaintiff,	)	
vs.	)	No. 757 Civil.
Elizabeth Houston,	)	
Defendant.	)	

This cause coming on at this time for hearing of arguments on Demurrer to Answer; Joseph F. Westall, Esq., appearing herein as attorney for the plaintiff; and Lucius K. Chase, Esq., being present as attorney for the defendant; said demurrer having been argued by Joseph F. Westall, Esq., of Counsel as aforesaid for plaintiff, and the Court having duly considered the same, is hereby overruled.

Now, at the hour of 11:30 o'clock A. M., the Court takes a recess until the hour of 2 o'clock P. M., of this day. Thereafter, at the hour of 2 o'clock P. M., the Court reconvenes;

At a stated term, towit: the July, A. D., 1921, Term of the District Court of the United States of America, within and for the Southern Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles, on Wednesday, the nine-

teenth day of October, in the year of our Lord one thousand nine hundred and twenty-one;

Present: The Honorable Benjamin F. Bledsoe, District Judge.

J. M. Rosborough, Plaintiff	)	
- vs -	)	No. 757 Civ.
Elizabeth Houston, etc., Defendant.	)	

This cause coming on at this time for argument; J. F. Westall, Esq., appearing as counsel for the plaintiff and Lucius K. Chase, Esq., appearing as counsel for the defendant and said J. F. Westall, Esq., having presented an argument in behalf of the plaintiff and said Lucius K. Chase, Esq., having presented an argument in behalf of the defendant and said J. F. Westall, Esq., having argued in rebuttal, and now, on motion of J. F. Westall, Esq., attorney as aforesaid, it is by the court ordered that Plaintiff's Exhibit No. 1 be released to plaintiff and that said cause be submitted on briefs, and said Lucius K. Chase, Esq., having filed his brief on behalf of the defendants, it is by the court ordered that the attorney for the plaintiff be allowed ten days within which to file brief on plaintiff's behalf.

At a stated term, to-wit: the July, A. D., 1922, Term of the District Court of the United States of America, within and for the Southern Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles, on Monday, the second day of October, in the year of our Lord one thousand nine hundred and twenty-two;

Present: The Honorable Benjamin F. Bledsoe, District Judge.

J. M. Rosborough, Plaintiff	)	
vs.	)	No. 757 Civil.
Elizabeth Houston, etc., Defendant.	)	

In this cause at this time the court hands down its Opinion and orders the same filed and thereupon instructs counsel for the plaintiff to prepare findings in accordance therewith giving judgment in favor of plaintiff herein for $10,060.00

At a stated term, to-wit: the July Term, A. D. 1922 of the District Court of the United States of America, within and for the Southern Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Tuesday the seventeenth day of October, in the year of our Lord one thousand nine hundred and twenty-two;

Present: The Honorable Benjamin F. Bledsoe, District Judge.

J. M. Rosborough, Plaintiff	)	
vs.	)	No. 757 Civil.
Elizabeth Houston, etc., Defendant.	)	

This cause having heretofore been submitted to the court for its consideration and decision and the court having thereafter handed down its opinion and instructed counsel for the plaintiff to prepare Findings and in accordance therewith Findings of Fact and Conclusions of Law having been presented to the court and

by the court signed and ordered filed herein, and judgment pursuant thereto having thereupon been presented to the court for signature, said judgment is thereupon signed by the court and ordered filed and entered herein.

IN THE DISTRICT COURT OF THE UNITED STATES SOUTHERN DISTRICT OF CALIFORNIA SOUTHERN DIVISION

J. M. Rosborough,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	
ELIZABETH HOUSTON, as sole beneficiary under the will of Otho S. Houston, deceased, and as Executrix of the Estate of the said Otho S. Houston, deceased,	)	At Law No. 757
	)	
Defendant.	)	

NOTICE OF PRESENTATION OF FINDINGS

To the above-named defendant, Elizabeth Houston, as sole beneficiary under the will of Otho S. Houston, deceased, *an* as Executrix, etc., and to Lucius K. Chase, No. 441-443 Title Insurance Building, Los Angeles, California, her attorney:

You will please take notice, that the court has directed the plaintiff to prepare findings in the above-entitled action, and that in accordance with said direction the said plaintiff has prepared findings therein, and

herewith serves upon you a copy of said proposed findings.

And you are further notified that said proposed findings will be presented to the said court to be signed five days after this service of a copy of the same upon you.

Dated this 11th day of October, 1922.

Robert M. Fulton and
WESTALL AND WALLACE
By Joseph F Westall
Attorneys for plaintiff.

Receipt of a copy of the above notice, and of plaintiff's proposed findings, referred to therein, is hereby admitted this 11 day of October, 1922.

Lucius K Chase
Attorney for Defendant.

IN THE DISTRICT COURT OF THE UNITED STATES SOUTHERN DISTRICT OF CALIFORNIA SOUTHERN DIVISION

At Law No. 757

J. M. ROSBOROUGH,

Plaintiff,

vs.

ELIZABETH HOUSTON, as sole beneficiary under the will of Otho S. Houston, deceased, and as Executrix of the Estate of said Otho S. Houston, deceased,

Defendant.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This action came on for trial on the 19th day of September, 1921, and having been tried before the Court (a jury trial having been waived) on the 19th and 20th days of September, 1921, Joseph F. Westall, Esq., of the firm of Westall and Wallace, appearing for plaintiff, and Lucius K. Chase, Esq., for defendant, and after hearing the allegations and proofs of the parties, and the arguments of counsel, and being advised in the premises, I hereby make and file the following findings of facts and conclusions of law constituting my decision in said action:

FINDINGS OF FACT

I.

That on and prior to the 15th day of November, 1915, plaintiff was the owner of the following described lands and tenements:

> Lot 1, block "B", Poole and Jones Tract, in the City of Los Angeles, County of Los Angeles, and State of California, as per map recorded in Book 10, Page 194 of Maps, in the Office of the County Recorder of said County,

which said lands and tenements then stood of record in the name of Edwin S. Crawford and Carrie R. Crawford, respectively, the son-in-law and daughter of plaintiff, who held the same in trust for plaintiff, together with all improvements thereon, and which, at the time of the filing of this complaint and at all times hereinbefore mentioned, were worth, to-wit, the sum

of Eight Thousand ($8,000.00) Dollars, and the rental value of which was sixty ($60) Dollars per month.

II.

That on or about the 27th day of October, 1915, defendant's testator, Otho S. Houston, offered to purchase the premises described in paragraph I of these findings, and in order to induce plaintiff to convey same to said Otho S. Houston, as a partial consideration for such conveyance, offered to transfer or assign to plaintiff a certain promissory note, dated at Los Angeles, California, January 30, 1915, promising to pay to the said Otho S. Houston, or order, ten years after date the sum of Nine Thousand Nine Hundred and Four ($9,904.00) Dollars, with interest thereon from date until paid at the rate of six per cent. per annum, interest payable semi-annually at Ft. Worth, Texas, all as more particularly set forth in paragraph V of the complaint in this cause; and also, as a further consideration for such conveyance, offered to assign and transfer to plaintiff a certain deed of trust, dated the 30th day of January, 1915, purporting to secure payment of said promissory note, last above described, which said Trust Deed is also more fully described and set forth in said complaint.

III.

That further to induce plaintiff to accept said transfer and assignment of said promissory note and trust deed, as a consideration for the conveyance of the premises described in paragraph I of these findings, said Otho S. Houston deceitfully, falsely, and fraudulently stated and represented to said plaintiff that said

land described in said trust deed and purporting to secure the payment of said promissory note was of great and substantial value, and was of such a value as to afford ample security for the payment of said note and any interest that might accrue thereon, that is to say, was worth in the aggregate the sum of between Fifteen Thousand ($15,000.00) and Twenty Thousand ($20,000.00) Dollars; that plenty of water suitable for irrigation of said land for agricultural purposes was available, and that said land could be so irrigated directly from the Pecos River (the course of which lies in approximately a semi-circle around said land); that a Buena Vista Water Company, furnished water for irrigation to lands on the side of said Pecos River opposite, but adjacent to the lands described in said trust deed; that such lands on said adjacent opposite side of said Pecos River so supplied with water for irrigation purposes were selling for Sixty and Seventy-five Dollars per acre; that water could be pumped from the river directly onto said land described in said plaintiff in this behalf laid out and expended to be taxed by the Clerk of this Court at the sum of $57.48 and that execution against said Elizabeth Houston trust deed, and thus irrigated it would be as productive, and as valuable as lands illustrated and described in a prospectus or folder purporting to illustrate and describe said adjacent Pecos River irrigated lands then and there exhibited by the said Houston to Edwin S. Crawford, who was then and there acting as agent for plaintiff and who thereafter communicated such representations to this plaintiff; that the J. A. Stroud

mentioned in the trust deed hereinbefore set forth had paid to him, the said Otho S. Houston, as the first installment of the purchase price of said land described in said trust deed, real estate then well worth Thirty-eight Hundred and Seventy-two ($3,872.00) Dollars, and in normal times worth Four Thousand ($4,000.00) Dollars in addition thereto giving him the promissory note secured by trust deed hereinbefore mentioned and described and had paid the installment of interest due July 30, 1915, under the terms of said note; and that said land was well worth all that said Stroud had paid for it and that if he, the said Otho S. Houston, was then in Texas and near the land he would not have sold it at the price as aforesaid stated and represented by him to have been paid for the same by the said J. A. Stroud.

IV.

That such representations in the immediately preceding paragraph of these findings set forth as having been made by the said Otho S. Houston, were each and all absolutely untrue, deceitful, and fraudulent, as he, the said Otho S. Houston, then and there well knew, and the plaintiff did not know, and that he, the said Otho S. Houston, made the same for the purpose and with the intent of deceiving plaintiff and of defrauding plaintiff out of his said lands and tenements hereinbefore in paragraph I of these findings described and did deceive plaintiff to his great injury, as hereinafter more specifically set forth; and said Otho S. Houston then and there well knew and plaintiff did not know that said land described in said trust deed and securing

the payment of said promissory note was not of great and substantial value, but was of very slight and insignificant value, and was not of such value as to afford ample security for the payment of said note and any interest that might accrue thereon; but was, on the contrary, grossly insufficient as a security for the amount of said note, and was not worth in the aggregate or at all the sum of between Fifteen Thousand ($15,000.00) Dollars and Twenty Thousand ($20,000.00) Dollars; but was not worth to exceed One Thousand ($1,000.00) Dollars; that it was not true that either plenty or sufficient water suitable for irrigation of said land for agricultural purposes was available in said Pecos River; on the contrary, except in times of freshets or floods, there was not sufficient water in said Pecos River for the irrigation of said lands and the water in said Pecos River (except possibly in times of freshets or floods) was so extremely salty and possessed of so much alkali as to be totally unsuitable and unfit for irrigation or for agricultural purposes; that the J. A. Stroud mentioned in the hereinbefore described trust deed had not paid to him, the said Otho S. Houston, as the first installment of the purchase price of said land, real estate then well worth thirty-eight Hundred Seventy-two ($3,872.00) Dollars, in addition thereto giving him a promissory note secured by trust deed hereinbefore described; that on the contrary, while it was true that the said J. A. Stroud did exchange or transfer to the said Houston, as a partial consideration for the land described in said trust deed, the following described lands:

All that certain tract or parcel of land lying and being situate in Reeves County, Texas, and being all of Section No. 269, Block No. 11, Certificate No. 1139, G. H. & S. A. Ry. Co. Survey, and containing 640 acres of land,

said last described lands were not of the value of Three Thousand and Eight Hundred and Seventy-two ($3,872.00) Dollars or Four Thousand ($4,000.00) Dollars, or any other sum or value exceeding the sum of Four Hundred and Eighty ($480.00) Dollars which the said Houston then well knew, and that said J. A. Stroud paid no value whatever for said land other than the promissory note hereinbefore described and land worth not exceeding Four Hundred and Eighty ($480.00) Dollars and that it is not true that said land was worth all or any substantial part of the pretended price the said J. A. Stroud had paid for it, but in truth and in fact was worth not to exceed in value the sum of One Thousand ($1,000.00) Dollars, as hereinbefore set forth, and that it was not true that the said Stroud had paid the installment of interest due July 30, 1915, under the terms of said note, or that the said Stroud had paid any part thereof or any of the accrued interest on said note.

V.

That the transaction at which the J. A. Stroud signed said promissory note and said trust deed set forth and described in paragraph V of the complaint in this action, was not a bona fide transaction between the said Otho S. Houston and the said J. A. Stroud, but on the contrary, was purely a fictitious transaction, and said

promissory note and trust deed were deceitful and fraudulent instruments or devices, by which the said Otho S. Houston, knowingly, willfully, deceitfully, and fraudulently intended and designed to cheat and defraud whoever could be induced to give value for them, and were designed and intended to cheat and defraud plaintiff in this action.

VI.

That plaintiff, long prior to any of the transactions referred to in the preceding paragraphs of these findings had been intimately acquainted with near relatives of the said Otho S. Houston, and had through such relationship acquired a high regard for their veracity, honesty, and fairness of dealing, and was of the belief that no member of the Houston family would deceive and defraud him and that, implicitly relying upon the said deceitful, false, and fraudulent representations, and believing the same to be true, and, being partially influenced by his said former friendly relations with the members of said Houston family, the plaintiff accepted the offer of the said Otho S. Houston, and on or about the 15th day of November, 1915, caused to be made, executed and delivered to the said Otho S. Houston by his said son-in-law, Edwin S. Crawford, and plaintiff's said daughter, Carrie R. Crawford, a deed to the premises described in paragraph I of these findings conveying the title thereto in fee to the said Otho S. Houston and thereupon let the said Otho S. Houston into possession of said premises, receiving from him as consideration therefor the promissory note and deed of trust mentioned and described in paragraph II of

the findings, together with the assignment in writing of the said Otho S. Houston thereof.

VII.

That while the plaintiff made a partial and rather cursory attempt to examine the Texas land, purporting to secure said promissory note, (being the land mentioned in said trust deed) he did no more than to make an unsuccessful attempt because of the said representations, false in character, made by defendant's testator.

VIII.

That neither the principal of said promissory note, mentioned and described in paragraph II of these findings, nor any part thereof has been paid, and though often demanded of said J. A. Stroud, neither the accrued interest, nor any part thereof has been paid, and that the said J. A. Stroud is financially irresponsible and unable to pay such interest, and has no reasonable prospects of being able to pay either principal or any part thereof or interest when the same shall become due, and has no property, real or personal, out of which any judgment for principal or interest of said note could be satisfied; and that said note, except to the extent of the value of the land conveyed in trust as security, as aforesaid, is entirely worthless and of no value, and any deficiency judgement that might be rendered in any foreclosure proceedings against the said J. A. Stroud looking toward the collection of principal and interest of said note would be uncollectible and worthless.

IX.

That the reasonable expenses, including court costs, miscellaneous expenses, and attorneys fees necessary to foreclose said trust deed and to secure title to the land described in said trust deed, mentioned in paragraph II of these findings, or the value thereof at judicial sale is Three Hundred ($300.00) Dollars.

X.

That the land mentioned in said trust deed, purporting to secure payment of said promissory note both mentioned in paragraph II of these findings, is not easily accessible, either to plaintiff's home in Texas, or to his place of residence in California, being about 600 miles distant by rail and automobile from plaintiff's home in Texas, and an inspection of said land or an investigation of its value would have required considerable time and involved great expense; and after the assignment of said promissory note and deed of trust, as set forth in paragraph VI hereof, until the 25th day of March, 1919, plaintiff did not have occasion to visit the locality in which said land is situated and had no opportunity to inspect the same, and from the time of said assignment until the 25th day of February, 1919, plaintiff had no notice or knowledge of any fact or thing which did or should have led him to believe that the statements and representations of the said Otho S. Houston, deceased, set forth in paragraph II of these findings were not true, and during all said time plaintiff continued to rely upon said statements and representations believing them to be true; that after said 15th day of November, 1915, the said

Houston and the said Stroud, continued, at the times and in the manner more specifically set forth, in paragraph XII of the complaint herein, with intent to further mislead, deceive, and defraud this plaintiff, and to prevent plaintiff from discovering the falsity of the representations in paragraph III of these findings set forth and the fraud which as aforesaid, had been practiced by said Houston upon said plaintiff, with full knowledge of their falsity, to deceitfully make other untrue, false, and fraudulent representations and to do and perform other fraudulent acts calculated and tending to and which did in fact deceive plaintiff and prevent him from discovering the fraud which had as aforesaid been practiced by said Houston upon him.

XI.

That on the 25th day of February, 1919, plaintiff was informed by persons whom he believed to be responsible and well informed that said land was grossly inadequate as a security for the payment of said promissory note, and, acting upon said information, on, to-wit, the 25th day of March, 1919, he personally visited said land and investigated its value and at that time first discovered that the statements and representations of the said Otho S. Houston, deceased, set forth in paragraph III of these findings were not true, but were false, fraudulent, and deceitful, as hereinbefore found.

That until the said discovery in March, 1919, of the great variance between the value of the said Texas land and the value as represented by said Otho S. Houston, as aforesaid, plaintiff had no reason to

suspect that the first cash payment represented by Houston to have been made on said land by said Stroud was not made as represented by said Houston.

XII.

That all the allegations of the complaint are true, and all of the allegations of the answer in denial thereof are not true.

XIII.

That the land mentioned in said trust deed purporting to secure payment of said promissory note mentioned in paragraph II of these findings is situated in a part of the country which has habitually very little rain and the freshets and floods referred to in paragraph IV of these findings are unusual and rare and for all practical purposes the water from the Pecos River, except on such rare and unusual occasions, cannot be used for irrigation or agricultural purposes.

XIV.

That the difference in value between the lands and tenements described in paragraph I of these findings and the promissory note and its security mentioned and described in paragraph II of these findings is Seven Thousand ($7,000.00) Dollars.

XV.

That it has not been proven as alleged in the third subdivision of paragraph V of defendant's answer herein that no claim was presented to said executrix or filed with the Clerk of the Superior Court of Los Angeles County, State of California, within the time alleged in said answer to be allowed by law for the presentation of claims in the matter of said estate for

the payment of the money alleged in said complaint to be due from said defendant as executrix of the estate of Otho S. Houston, deceased to said plaintiff.

XVI.

That it has not been proven as alleged in the fourth subdivision of paragraph V of defendant's answer herein that no claim was presented to said executrix or filed with the Clerk of the Superior Court of Los Angeles County, State of California, within the time alleged in said answer to be allowed by law for the presentation of claims in the matter of said estate to recover damages for the deceit and fraud averred in said complaint.

CONCLUSIONS OF LAW.

I.

That defendants testator was guilty of fraud in the transaction complained of in the complaint filed herein.

II.

That such fraud and the circumstances incident to it (resulting in the injury to plaintiff complained of) constitutes proper grounds for this action at law for deceit.

III.

That this action survives against defendant as executrix of the estate of said Otho S. Houston, deceased.

IV.

That the cause of action set forth in the complaint is not barred by the provisions of any statute of limitations of the State of California; and particularly is not barred by the provisions of Section 338 of the Code of Civil Procedure of the State of California.

V.

That by reason of said false, fraudulent, and deceitful representations of defendant's testator, the said Otho S. Houston, during his lifetime, plaintiff has suffered damage and injury to the extent of the difference in value between the lands and tenements described in paragraph I of these findings and the promissory note and its security mentioned and described in said paragraph II of these findings, (which difference in value I have found to be the sum of seven thousand dollars ($7,000.00) together with the sum of Three Hundred ($300.00) Dollars, reasonable court costs, expenses, and attorneys fees necessary to foreclose said trust deed, and secure title to the land described in said trust deed or the value thereof at judicial sale to third person; and has been damaged in the further sum of Two Thousand Seven Hundred and Sixty ($2,760.00) Dollars rental value of the premises described in paragraph I of these findings from said 15th day of November, 1915, to the date of filing this complaint; all and each of which separate amounts aggregate the sum of Ten Thousand and Sixty ($10,060.00) Dollars.

VI.

That neither said sum of Ten Thousand and Sixty ($10,060.00) Dollars nor any part thereof has been paid.

VII.

That judgment in the sum of Ten Thousand and Sixty ($10,060.00) Dollars should be rendered in favor of plaintiff and against defendant as executrix of the estate of the said Otho S. Houston, deceased, to be paid in due course of administration.

VIII.

That judgment for plaintiffs costs to be taxed should be rendered against said Elizabeth Houston, individually, and not as said executrix and that execution should issue therefor.

DATED this 17th day of October, 1922.

Benjamin F. Bledsoe
U. S. District Judge.

[Endorsed]: No. 757 AT LAW IN THE DISTRICT COURT OF THE UNITED STATES In and for the Southern District of California SOUTHERN DIVISION J. M. ROSBOROUGH Complainant vs. ELIZABETH HOUSTON Defendant FINDINGS OF FACT AND CONCLUSIONS OF LAW and NOTICE OF THE PRESENTATION THEREOF. Filed Oct 17 1922 Chas. N. Williams, Clerk Edmund L. Smith, Deputy R. M. FULTON and WESTALL and WALLACE ATTORNEYS AT LAW SUITE 516 TRUST & SAVINGS BLDG. LOS ANGELES Phone 65683 Attorneys for Plaintiff

IN THE DISTRICT COURT OF THE UNITED STATES SOUTHERN DISTRICT OF CALIFORNIA SOUTHERN DIVISION

J. M. ROSBOROUGH, Plaintiff, vs. ELIZABETH HOUSTON, as sole beneficiary under the will of Otho S. Houston, deceased, and as Executrix of the Estate of said Otho S. Houston, deceased, Defendant.) AT LAW No. 757

JUDGMENT

This cause came on regularly for trial before the court without a jury (a jury having been waived by the parties hereto) on the 19th day of September, 1921, and Messrs. Joseph F. Westall and R. M. Fulton, appearing for plaintiff and Lucius K. Chase, appearing for defendant, and after hearing the evidence adduced on behalf of both parties plaintiff and defendant, the evidence being closed, and arguments of counsel heard, the cause was submitted to the Court for consideration and decision; and after due deliberation thereon the court delivered its findings and decision in writing, which have been filed, and ordered that judgment be entered in accordance therewith;

Whereupon, by reason of the law and findings aforesaid, it is ordered and adjudged that plaintiff do have and recover of and from the defendant the sum of Ten Thousand and Sixty ($10,060.00); that said claim set forth in the complaint be and the same is hereby allowed as a claim against said estate, and that the same be paid in due course of administration by said defendant;

It is further ordered and adjudged that plaintiff have and recover of and from the defendant individually and not as executrix of said estate, the costs of this plaintiff in this behalf laid out and expended to be taxed by the Clerk of this Court at the sum of $57.48 and that execution against said Elizabeth Houston issue therefor.

Judgment Rendered this 17 day of October, 1922.

Benjamin F. Bledsoe
United States District Judge.

[Endorsed]: No. 757 AT LAW IN THE DISTRICT Court OF THE UNITED STATES In and for the Southern District of California SOUTHERN DIVISION J. M. ROSBOROUGH Complainant vs. ELIZABETH HOUSTON, etc Defendant JUDGMENT FILED Oct 17 1922 Chas. N. Williams, Clerk by Edmund L. Smith R. M. FULTON WESTALL AND WALLACE ATTORNEYS AT LAW SUITE 516 TRUST & SAVINGS BLDG. LOS ANGELES Phone 65683 Attorneys for Plaintiff Judg B 3/12/3

IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA.
SOUTHERN DIVISION.

J. M. ROSBOROUGH, Plaintiff, - vs - ELIZABETH HOUSTON, as sole beneficiary under the will of Otho S. Houston, deceased, and as Executrix of the Estate of the said Otho S. Houston, deceased, Defendant.	NO. 757 Civil.

I, Chas N. Williams, Clerk of the District Court of the United States for the Southern District of California, do hereby certify the foregoing to be a full, true and correct copy of an original JUDGMENT entered in the above-entitled action, and recorded in

JUDGMENT BOOK NO. 3 for the Southern Division at Page 124 thereof; and I do further certify that the papers hereto, constitute the JUDGMENT ROLL in said action.

Attest my hand and the seal of said District Court, this 27th day of October, A. D., 1922.

Chas. N. Williams, Clerk,
By Edmund L. Smith
[Seal] Deputy Clerk.

[Endorsed]: No. 757 Civil. In the District Court OF THE UNITED STATES for the Southern District of California Southern Division. J. M. Rosborough, vs. Elizabeth Houston, etc. JUDGMENT ROLL. Filed Oct. 27-, 1922 CHAS. N. WILLIAMS, Clerk By Edmund L. Smith Deputy Clerk Recorded Judgment Book No. 3 Page 123

IN THE DISTRICT COURT OF THE UNITED STATES SOUTHERN DISTRICT OF CALIFORNIA SOUTHERN DIVISION

J. M. ROSBOROUGH, Plaintiff - vs - ELIZABETH HOUSTON, AS SOLE Beneficiary under the Will of Otho S. Houston, deceased, and as Executrix of the Estate of Otho S. Houston, deceased. Defendant.	AT LAW No. 757 ASSIGNMENT OF ERRORS.

Now comes the above entitled defendant, Elizabeth Houston, as sole beneficiary under the will of Otho S. Houston, deceased, and as Executrix of the Estate of said Otho S. Houston, deceased, and files the following assignment of errors upon which she will rely upon her prosecution of her appeal in the above entitled cause through writ of error, from the judgment made by this Honorable Court on the 17th day of October, 1922.

I.

That the said United States District Court for the Southern District of California, Southern Division, erred in overruling the demurrer interposed by the defendant and appellant to the original complaint filed in the cause.

II.

Said Court also erred in rendering judgment against Elizabeth Houston, as Executrix of the Estate of Otho S. Houston, deceased, for the reason that the special findings made and filed herein by the Court do not support such judgment.

III.

Said Court also erred in rendering judgment against Elizabeth Houston, as an individual, for the reason that the special findings made and filed herein by the Court do not support such judgment.

IV.

Said Court erred in *rending* judgment against Elizabeth Houston, as executrix of the Estate of Otho S. Houston, deceased, and also erred in rendering judgment against Elizabeth Houston, individually, for that the special findings of fact made by said Court

do not support said judgment or any portion thereof, for that the special findings of fact filed herein affirmatively show that the cause of action in favor of plaintiff lapsed with, and did not survive the death of Otho S. Houston.

V.

Said Court erred in rendering judgment against Elizabeth Houston, as executrix of the Estate of Otho S. Houston, deceased, and also erred in rendering judgment against Elizabeth Houston, individually, for that the special findings of fact made by said Court do not support said judgment or any portion thereof, for that no affirmative finding was made that a claim had been filed against the estate of Otho S. Houston, deceased, prior to the institution of this action.

VI.

Said Court erred in rendering judgment against Elizabeth Houston, as Executrix of the Estate of Otho S. Houston, deceased, and also erred in rendering judgment against Elizabeth Houston, individually, for that the special findings of fact made by said Court do not support said judgment or any portion thereof, for that the special findings of fact made and filed herein by said Court show that plaintiff Rosborough made an independent investigation of the lands before the trade was consummated, and hence cannot be said to have relied on the fraud charged.

VII.

Said Court erred in rendering judgment against Elizabeth Houston, as executrix of the Estate of Otho S. Houston, deceased, in that it affirmatively appears

from the said findings that to the extent of Twenty-seven Hundred Dollars ($2700.00) thereof the judgment is excessive in that in an action at law to recover damages for fraudulent misrepresentations inducing the trade of real estate, said judgment to the extent of Twenty-seven Hundred Dollars ($2700.00) consisted of the rental value of plaintiff's demised premises from November 15, 1915, the date of the transfer of plaintiff's property to Otho S. Houston, to the date suit was filed herein by said plaintiff.

VIII.

The Court erred in rendering that portion of the judgment rendered against Elizabeth Houston as an individual for the reason that neither the facts alleged in said complaint filed herein, nor the findings of fact filed herein, show or state a cause of action in favor of plaintiff against said Elizabeth Houston as an individual.

IX.

The Court erred in rendering that portion of the judgment rendered against Elizabeth Houston, as Executrix of the Estate of Otho S. Houston, deceased, for the reason that neither the facts alleged in said complaint filed herein, nor the findings of fact filed herein, show or state a cause of action in favor of plaintiff against said Elizabeth Houston, as Executrix of the Estate of Otho S. Houston, deceased.

WHEREFORE, Appellant prays that said judgment be reversed and that said District Court of the United States, for the Southern District of California,

Southern Division, be ordered to enter a judgment reversing the decision of the lower Court in said cause.

Lucius K. Chase
Attorney for Defendant and Appellant.

[Endorsed]: Original AT LAW No. 757 Dept... IN THE DISTRICT COURT of the United States Southern District OF CALIFORNIA Southern Division. J. M. ROSBOROUGH Plaintiff vs. ELIZABETH HOUSTON, as sole beneficiary under the Will of Otho S. Houston, deceased, and as Executrix of the Estate of Otho S. Houston, Dec'd. Defendant ASSIGNMENT OF ERRORS Filed Apr 10 1923 Chas N Williams, Clerk By R S. Zimmerman Deputy Clerk LUCIUS K. CHASE Attorney for Defendant 442-444 Title Insurance Building LOS ANGELES, CALIFORNIA

IN THE UNITED STATES DISTRICT COURT
IN AND FOR THE SOUTHERN DISTRICT
OF CALIFORNIA, SOUTHERN
DIVISION.

J. M. Roseborough, Plaintiff,	)	
vs.	)	Civil 757
Elizabeth Houston, etc., Defendant.	)	

Messrs. Robert M Fulton, and Westall & Wallace of Los Angeles, Cal., Attorneys for Plaintiff.

Lucius K. Chase, Esq., of Los Angeles, Cal., Attorney for Defendant.

MEMORANDUM OPINION.

Bledsoe, District Judge:—In this case, I have given very attentive consideration to the points involved. As

I indicated from the bench at the oral argument, there is no doubt in my mind but that the defendant's testator was guilty of the grievous fraud alleged. A study of the entire transaction, from its very inception to its consummation, indicates a fraudulent intent and purpose. The securing of the promissory note and trust deed subsequently delivered to the plaintiff, was itself a fraud and serves to demonstrate in clearest fashion that the entire transaction was actuated by the same motives.

The plaintiff made a partial and rather cursory examination of the property involved but I am persuaded that he did no more than he actually did because of the representations, false in character, made by defendant's testator. In that wise, I am confident that he relied to his discomfiture upon those representations and that he should not now be denied relief because of the fact that, acting upon such representations, he did not investigate further and ascertain the very material fact, not apparent from surface indications, that the water apparently available for the irrigation of the soil, was so saline in character that it could not be used thereon.

The plea of the statute of limitations, in my judgment, is not well taken. The plaintiff did not buy the land and had no present interest in the land. In consequence, it was not his duty to go upon the land. He merely bought a promissory note, the payment of which was secured by a mortgage or trust deed upon the land and there was no occasion for him to inquire into the availability or acceptability of the land until the time came for him to foreclose upon his security.

At that time, he did make the discovery as to the worthlessness of his security and from then on he acted with all requisite promptitude.

The point is urged again that the action may not be maintained against the Executrix of Houston. I find nothing in the statutes of California denying the right of a plaintiff in such a case to proceed against the Executrix. The property actually obtained by the fraud of the deceased or its fruits having come into the hands of the Executrix now serves to enrich the estate in her hands. Right and justice would seem to demand that such an unlawful enrichment should not be permitted and that the value of the thing wrongfully acquired and wrongfully retained should be recoverable. No statutory inhibition existing, I am persuaded that the rule of the common law is to be followed. From a careful reading of the case of Hambly v. Trott, 1 Cowp. 371, which is very illuminating in its reasoning, I understand the rule to be at common law, that the party defrauded may seek relief as for the value of the thing obtained even as against the executor. Here, as the result of the fraud, the estate of the deceased has been enriched and the effort merely is to obtain that which has thus been wrongfully secured and retained. See also to same effect, 1 C. J. 174.

The property of the plaintiff wrongfully obtained by defendant's testator was reasonably worth eight thousand dollars. The rental value of the same amounted to sixty dollars per month. In view of these facts, the plaintiff will take judgment as prayed for in the sum of $10,060.00.

Plaintiff's counsel will prepare and present findings. October 2, 1922.

[Endorsed]: No. 757 Civ. IN THE District COURT OF THE UNITED STATES FOR THE Southern District of California J. M. Roseborough vs. Elizabeth Houston etc. Memorandum Opinion. FILED OCT 2 1922 CHAS. N. WILLIAMS, Clerk By Edmund L Smith Deputy.

IN THE DISTRICT COURT OF THE UNITED STATES SOUTHERN DISTRICT OF CALIFORNIA SOUTHERN DIVISION

J. M. ROSBOROUGH	)	
Plaintiff	)	
- vs -	)	AT LAW No. 757 PETITION FOR WRIT OF ERROR
ELIZABETH HOUSTON, as sole beneficiary under the will of Otho S. Houston, deceased, and as Executrix of the Estate of Otho S. Houston, deceased,	)	
Defendant.	)	

And now comes the defendant herein, ELIZABETH HOUSTON, as sole beneficiary under the will of Otho S. Houston, deceased, and as Executrix of the Estate of Otho S. Houston, deceased, and says that on the 17th day of October, 1922, this court entered judgment herein in favor of the plaintiff and against this defendant, in which judgment and the proceedings had prior

thereunto in this cause certain errors were committed, to the prejudice of this defendant, all of which will more in detail appear from the assignment of errors which is filed with this petition.

WHEREFORE this defendant prays that a writ of error may issue in this behalf to the United States Circuit Court of Appeals for the Ninth District, for the correction of errors so complained of, and that a transcript of the record, proceedings, and papers in this cause, duly authenticated, may be sent to the said circuit court of appeals.

Lucius K. Chase

Attorney for Defendant, Elizabeth Houston, as sole beneficiary under the will of Otho S. Houston, deceased, and as Executrix of the Estate of Otho S. Houston, deceased.

WRIT OF ERROR allowed upon defendant giving bond for security for costs in the sum of $250.00

Bledsoe
Judge.

[Endorsed]: AT LAW No. 757 Dept..... IN .THE United States COURT Southern District of CALIFORNIA Southern Division J. M. ROSBOROUGH plaintiff vs. ELIZABETH HOUSTON, as sole beneficiary under the will of Otho S. Houston, deceased, and as Executrix of the Estate of Otho S. Houston, dec'd Defendant PETITION FOR WRIT OF ERROR Filed Apr 10 1923 Chas. N. Williams, Clerk By R S Zimmerman Deputy Clerk LUCIUS K. CHASE Attorney for Defendant. 442-444 Title Insurance Building LOS ANGELES, CALIFORNIA

IN THE DISTRICT COURT OF THE UNITED STATES SOUTHERN DISTRICT OF CALIFORNIA SOUTHERN DIVISION

J. M. ROSBOROUGH)

Plaintiff)

- vs - (

ELIZABETH HOUSTON, as sole beneficiary under the will of Otho S. Houston, deceased, and as Executrix of the Estate of Otho S. Houston, deceased,)

Defendant.)

AT LAW No. 757
BOND ON WRIT OF ERROR.

- - - - - - -

KNOW ALL MEN BY THESE PRESENTS, that I, ELIZABETH HOUSTON, as sole beneficiary under the will of Otho S. Houston, deceased, and as Executrix of the Estate of Otho S. Houston, deceased, as principal, and Fred H. Richman and Sam Houston as sureties, are jointly and severally held and firmly bound unto the plaintiff, J. M. Rosborough in the full and just sum of Two Hundred Fifty Dollars ($250.00) to be paid to the said plaintiff, J. M. ROSBOROUGH, his certain attorneys, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents. Sealed with our seals and dated this 11th day of April, in the year of our Lord one thousand nine hundred and twenty-three.

WHEREAS,lately at a district court of the United States, Southern District of California, Southern Division, in a suit depending in said court, between J. M. Rosborough, plaintiff, and Elizabeth Houston, as sole beneficiary under the will of Otho S. Houston, deceased, and as Executrix of the Estate of Otho S. Houston, deceased, defendant, a judgment was rendered against the said Elizabeth Houston, as sole beneficiary under the will of Otho S. Houston, deceased, and as Executrix of the Estate of Otho S. Houston, deceased, and the said Elizabeth Houston, as sole beneficiary under the will of Otho S. Houston, deceased, and as Executrix of the Estate of Otho S. Houston, deceased, having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said J. M. Rosborough citing and admonishing him to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the city of San Francisco, California, in said circuit, on the 9th day of May next.

Now, the condition of the above obligation is such, that if the said Elizabeth Houston, as sole beneficiary under the will of Otho S. Houston, deceased, and as Executrix of the Estate of Otho S. Houston, deceased, shall prosecute said writ of error to effect and answer all costs if she fails to make the said plea good, then

the above obligation to be void, else to remain in full force and virtue.

Elizabeth Houston Smith
formally—Elizabeth Houston

As sole beneficiary under the will of Otho S. Houston, deceased, and as Executrix of the Estate of Otho S. Houston, deceased.

Fred H Richman
Sam Houston

Sealed and delivered in presence of
Lucius K. Chase
M. M. Thompson
as to Sam Houston

STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES)

Fred H Richman and.....being duly sworn, each for himself, says: That he is one of the sureties named in the above bond; that he is a resident and freeholder within said district, and is worth the said sum of Two Hundred Fifty Dollars ($250.00) over and above all his debts and liabilities, exclusive of property exempt from execution.

Fred H Richman

Subscribed and sworn to before me this 11 day of April, 1923.

[Seal] J. E. Johnson
Notary Public in and for the County of Los Angeles, State of California.

STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES)

Sam Houston, being duly sworn, says: That he is one of the sureties named in the above bond; that he is a resident and free-holder within said district, and is worth the said sum of Two Hundred Fifty Dollars ($250.00) over and above all his debts and liabilities, exclusive of property exempt from execution.

Sam Houston

Subscribed and sworn to before me this 14th day of April, 1923.

Seal Anna S Lewis

Notary Public in and for the County of Los Angeles, Stateof California.

Examined and recommended for approval, as provided in Rule 29.

Lucius K. Chase
Attorney

I hereby approve the foregoing bond.

Bledsoe

United States Judge for the Southern District of California, Southern Division.

4/14/23

[Endorsed]: AT LAW *No. 757 Dept*..... IN THE DISTRICT COURT of the United States Southern District OF CALIFORNIA Southern Division J. M. ROSBOROUGH *Plaintiff vs.* ELIZABETH HOUSTON, as sole beneficiary under the Will of Otho S. Houston, deceased, and as Executrix of the Estate of Otho S. Houston, Deceased *Defendant* BOND ON WRIT OF ERROR Filed Apr 16 1923

Chas. N. Williams, Clerk By W. J. Tufts, Deputy Clerk LUCIUS K. CHASE *Attorney for* Defendant. 442-444 Title Insurance Building LOS ANGELES, CALIFORNIA

UNITED STATES OF AMERICA DISTRICT COURT OF THE UNITED STATES SOUTHERN DISTRICT OF CALIFORNIA

J. M. ROSBOROUGH, Plaintiff - vs - ELIZABETH HOUSTON, as sole beneficiary under the will of Otho S. Houston, deceased, and as Executrix of the Estate of Otho S. Houston, deceased, Defendant.) CLERK'S OFFICE) No. 757 - At Law) PRAECIPE

TO THE CLERK OF SAID COURT:

Sir:

Please issue for printing:

Judgment Roll, Assignment of Errors, Petition for Writ of Error and Order Allowing Same, Affidavit of Service of Writ of Error, Bond on Writ of Error, Writ of Error, and Citation.

Lucius K. Chase
Attorney for defendant.

[Endorsed]: No. 757 At Law United States District Court SOUTHERN DISTRICT OF CALIFORNIA J. M. ROSBOROUGH Plaintiff vs ELIZABETH HOUSTON, etc. Defendant. PRAECIPE FOR Transcript on Writ of Error FILED APR 30, 1923 CHAS. N. WILLIAMS, Clerk. By R S Zimmerman Deputy Clerk.

IN THE DISTRICT COURT OF THE UNITED STATES, SOUTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION.

J. M. Rosborough, Plaintiff, - vs - ELIZABETH HOUSTON, as sole beneficiary under the will of Otho S. Houston, deceased, and as Executrix of the Estate of the said Otho S. Houston, deceased, Defendant.	CLERK'S CERTIFICATE.

I, CHAS. N. WILLIAMS, Clerk of the United States District Court for the Southern District of California, do hereby certify the foregoing volume containing 76 pages, numbered from 1 to 76 inclusive, to be the Transcript of Record on Writ of Error in the above entitled cause, as printed by plaintiff in error and presented to me for comparison and certification, and that the same has been compared and corrected by me and contains a full, true and correct copy of the citation, writ of error, affidavit of service of writ of error, complaint, summons, demurrer, order overruling demurrer, answer, demurrer to answer, order overruling demurrer, minute orders, notice of presentation of findings, findings of fact and conclusions of law, judgment, clerk's certificate to judgment roll, assignment of errors, opinion, petition for writ of error and order allowing same, bond and praecipe.

I DO FURTHER CERTIFY that the fees of the Clerk for comparing, correcting and certifying the foregoing Record on Writ of Error amount to and that said amount has been paid me by the plaintiff ir error herein.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the Seal of the District Court of the United States of America, in and for the Southern District of California, Southern Division, this day of May, in the year of our Lord One Thousand Nine Hundred and Twenty-three, and of our Independence the One Hundred and Forty-seventh.

CHAS. N. WILLIAMS,
Clerk of the District Court of the United States of America, in and for the Southern District of California.
By

Deputy.

No. 4038

IN THE

United States
Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

Elizabeth Houston, as Sole Beneficiary Under the Will of Otho S. Houston, Deceased, and as Executrix of the Estate of Otho S. Houston, Deceased,

Plaintiff in Error.

vs.

J. M. Rosborough,

Defendant in Error.

OPENING BRIEF OF PLAINTIFF IN ERROR.

LUCIUS K. CHASE,
Attorney for Plaintiff in Error.

Parker, Stone & Baird Co., Law Printers, 232 New High St., Los Angeles.

IN THE

United States

Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

Elizabeth Houston, as Sole Beneficiary Under the Will of Otho S. Houston, Deceased, and as Executrix of the Estate of Otho S. Houston, Deceased,

Plaintiff in Error.

vs.

J. M. Rosborough,

Defendant in Error.

OPENING BRIEF OF PLAINTIFF IN ERROR.

This is an action in deceit, instituted by defendant in error, Rosborough, against Elizabeth Houston, as sole beneficiary under the will of Otho S. Houston, deceased, and also against Elizabeth Houston as executrix of the estate of said Otho S. Houston, deceased, to recover damages for an alleged fraud arising out of misrepresentations made by Otho S. Houston in his lifetime, and thereby inducing Rosborough to trade certain real estate in Los Angeles for a trust deed secured by certain real property in Texas belonging

to Houston. A demurrer was interposed in which it was averred that the complaint did not state facts sufficient to constitute a cause of action either against Elizabeth Houston as an individual or against her as executrix of the estate of her deceased husband. Misjoinder of parties defendant and misjoinder of causes of action were also averred. The demurrer was overruled and the parties proceeded to trial. The trial court found in favor of the defendant in error on questions of fraud and false representations, and judgment was thereupon entered against Elizabeth Houston, as executrix of the estate of said Otho S. Houston, deceased, for the difference between the value of the property received by him and the property traded by him, plus the rental value of the property traded by him from the date of the trade to the date of trial. The court also rendered judgment against Elizabeth Houston as an individual for the costs incurred in the trial. The specifications of error will be found on page 64 of the transcript.

We make the following contentions as warranting this court in reversing the action of the trial court and remanding the case with directions that judgment be entered herein that defendant in error take nothing:

First: That the cause of action in favor of defendant in error lapsed with and did not survive the death of Otho S. Houston, and that therefore the complaint did not state a cause of action, and the court erred in overruling the demurrer and in rendering judgment against the plaintiff in error.

Second: The complaint furthermore does not state a cause of action if we are to assume that the action is based on contract, in that there is no allegation and no affirmative finding that a claim was filed against the estate of Otho S. Houston proir to the institution of the action.

Third: There is absolutely no warrant for the judgment against Elizabeth Houston as an individual. The complaint did not state any cause of action against her on any possible theory, and the findings do not support any judgment against her as an individual.

Fourth: The judgment against Elizabeth Houston as executrix is excessive to the extent of twenty-seven hundred sixty dollars ($2760.00) thereof. Defendant in error recovered judgment against Elizabeth Houston as executrix not only to the extent of the difference between the reasonable value of what he parted with and the reasonable value of what he received, but also to the extent of twenty-seven hundred sixty dollars ($2760.00) which consisted of the rental value of defendant's in error demised premises from the date of the trade to the date suit was filed.

The specifications of error relied upon are as follows:

I.

That the said United States District Court for the Southern District of California, Southern Division, erred in overruling the demurrer interposed by the

defendant and appellant to the original complaint filed in the cause.

II.

Said court also erred in rendering judgment against Elizabeth Houston, as executrix of the estate of Otho S. Houston, deceased, for the reason that the special findings made and filed herein by the court do not support such judgment.

III.

Said court also erred in rendering judgment against Elizabeth Houston, as an individual, for the reason that the special findings made and filed herein by the court do not support such judgment.

IV.

Said court erred in rendering judgment against Elizabeth Houston, as executrix of the estate of Otho S. Houston, deceased, and also erred in rendering judgment against Elizabeth Houston, individually, for that the special findings of fact made by said court do not support said judgment or any portion thereof, for that the special findings of fact filed herein affirmatively show that the cause of action in favor of plaintiff lapsed with, and did not survive the death of Otho S. Houston.

V.

Said court erred in rendering judgment against Elizabeth Houston, as executrix of the estate of Otho S. Houston, deceased, and also erred in rendering

judgment against Elizabeth Houston, individually, for that the special findings of fact made by said court do not support said judgment or any portion thereof, for that no affirmative finding was made that a claim had been filed against the estate of Otho S. Houston, deceased, prior to the institution of this action.

VII.

Said court erred in rendering judgment against Elizabeth Houston, as executrix of the estate of Otho S. Houston, deceased, in that it affirmatively appears from the said findings that to the extent of twenty-seven hundred dollars ($2700.00) thereof the judgment is excessive in that in an action at law to recover damages for fraudulent misrepresentations inducing the trade of real estate, said judgment to the extent of $2700.00 consisted of the rental value of plaintiff's demised premises from November 15, 1915, the date of the transfer of plaintiff's property to Otho S. Houston, to the date suit was filed herein by said plaintiff.

VIII.

The court erred in rendering that portion of the judgment rendered against Elizabeth Houston as an individual for the reason that neither the facts alleged in said complaint filed herein, nor the findings of fact filed herein, show or state a cause of action in favor of plaintiff against said Elizabeth Houston as an individual.

IX.

The court erred in rendering that portion of the judgment rendered against Elizabeth Houston, as executrix of the estate of Otho S. Houston, deceased, for the reason that neither the facts alleged in said complaint filed herein, nor the findings of fact filed herein, show or state a cause of action in favor of plaintiff against said Elizabeth Houston, as executrix of the estate of Otho S. Houston, deceased.

I.

The Cause of Action in Favor of Defendant in Error Lapsed With and Did Not Survive the Death of Otho S. Houston. Therefore the Complaint Did Not State a Cause of Action, and the Court Erred in Overruling the Demurrer and in Rendering Judgment Against the Plaintiff in Error.

This is an action, as stated in the complaint, "for deceit," in which the defendant in error claims damages for a fraud perpetrated upon him in his lifetime by the decedent, Otho S. Houston, in inducing him to trade Los Angeles property for a trust deed upon Texas property, by misrepresenting the value of the Texas property. It is our contention:

(1) That this is an action brought to recover damages for tort committed.

(2) That under the common law an action brought to recover damages for a tort committed does not survive the death of the tort feasor in the absence of express statute declaring such survival.

(3) That there is no specific California statute declaring that an action brought to recover damages for a fraud committed shall survive the death of the tort feasor.

This is a tort action brought to recover damages for a fraud committed.

Under the California decisions, when a party has been defrauded through misrepresentations inducing a trade, he may elect either to affirm the transaction and bring his action for damages, or disaffirm the transaction and bring an action for rescission. He cannot do both.

> Westerfeld v. N. Y. Life Ins. Co., 129 Cal. 73;
> Youmans v. Bell, 45 N. E. 552 (N. Y.).

The defendant in error in the instant case has elected to affirm the transaction and bring his action for damages. He has made no effort to disaffirm the transaction and no effort to state a cause of action in rescission. He has brought his action in law, entitled his complaint, "Complaint for Deceit," has affirmed the trade and has sought to recover damages.

(2) *That under the common law an action brought to recover damages for a tort committed does not survive the death of the tort feasor in the absence of express statute declaring such survival.*

It is well settled in common law that an action for damages caused by fraud does not survive *in favor of* or *against* the personal representative. Bigelow in his treatise on Frauds, Sec. 5, p. 213, states the doctrine as follows:

> "By the rules of common law, actions for damages caused by fraud do not survive to the representative of the injured party. Where such action will survive must therefore be a question of statute, and the statutes vary considerably. * * * It may be added that just as there is no survivorship apart from statute in favor of the estate of a decedent who has been defrauded, so there is no survivorship apart from statute against the estate of a decedent guilty of fraud." Bigelow on Frauds, Sec. 10, p. 251. (See cases cited therein.)

This doctrine of the common law, as thus enunciated, has been declared to be the law of this state in

Harker v. Clark, 57 Cal. 246;

Fowden v. Pacific Coast Steamship Co., 149 Cal. 153;

Hannon v. Harper, 9 Cal. App. 260;

Kramer v. Market Street Co., 25 Cal. 435.

In Harker v. Clark, an action to recover damages for false arrest, *supra*, on page 246, the court declares the foregoing doctrine as follows:

> "This action is clearly within the maxim, 'A personal right of action dies with the person,' unless the right of action has been kept alive by some statute."

Throughout the United States, the authorities of all the states that have passed upon the subject, uniformly hold that at common law, in the absence of statute, an action in tort dies with the tort feasor. And the doctrine is specifically applied in actions of

deceit. The only exception to the rule exists only in those cases where an action is instituted to recover specific property wrongfully taken or converted or is instituted in assumpsit to recover the value thereof.

Reed v. Hatch, 19 Pick 47;
Henshaw v. Miller, 17 How. 212;
United States v. Daniels, 47 U. S. (6 Howd.) 11, 12 Lawyers' Ed. 323;
Jones v. Ellis Estate, 35 Atl. (Vt.) 488;
Lane v. Frawley, 78 N. W. (Wis.) 593;
Strattons Independence v. Dines, 126 Fed. 968;
Abern v. McClinchy, 90 Atl. (Me.) 709;
Rockwell v. Furness, 102 N. E. (Mass.) 914;
Newsom v. Jackson, 29 Ga. 61;
Cotting v. Tower, 80 Mass. 183;
Leggate v. Moulton, 115 Mass. 552;
Jones v. Barm, 75 N. E. (Ill.) 505;
Killen v. State Bank, 82 N. W. (Wisc.) 536;
Hedekin v. Gillespie, 72 N. E. (Ind.) 143;
Beavers Administratrix v. Putnams Curator, 67 S. E. (Va.) 353;
Carson v. Brandt, 2 Brev. (S. C.) 159;
Huff v. Waltans, 20 S. C. 477;
Jenkins v. Bennett, 18 S. E. (S. C.) 929;
Watson v. Loop, 12 Tex. 11;
Willard v. Mohn, 139 N. W. (N. D.) 981;
Young v. Aynsworth, 86 Atl. (R. I.) 555;
Demczuk v. Jenifer, 114 Atl. (Md.) 471.

In the instant case it will be observed that the learned trial judge in his opinion makes no claim that the

action survived by reason of being within any of the California statutes relating to survivorship. The opinion is based upon what the court conceives the common law doctrine of survivorship, the court declaring,

> "I understand the rule to be at common law, that the party defrauded may seek relief as for the value of the thing obtained even as against the executor. Here, as the result of the fraud, the estate of the deceased has been enriched and the effort merely is to obtain that which has thus been wrongfully secured and retained,"

citing in support thereof the case of Hambly v. Trott, 1 Cowp. 371, and then proceeds to render judgment against the plaintiff in error. There is no finding that the estate as such was enriched. The action is one to recover damages for fraud perpetrated by the decedent, not to recover the property traded. Of course to the extent that decedent profited by the transaction, his general estate may have been benefited. If, because his estate may have been benefited, the cause of action survived at common law, then at common law all actions in tort at common law must have survived, which is not the fact.

The trial court entirely overlooks the distinction between survivorship in cases of action in tort and survivorship in actions in assumpsit or a recupatory action where the action is brought to recover the thing taken or is brought in assumpsit to recover on an implied promise to pay the value of the thing taken. The very case of Hambly v. Trott, cited by the learned trial

judge in support of his statement, very clearly establishes the distinction. Hambly v. Trott was brought in trover against the executor of a decedent who, in his lifetime, had converted some goats and other chattels belonging to the plaintiff. It was held that the action being in form a tort action, would not survive, the court indicating, however, that an action for money had and received, based upon an implied promise to pay the value of the goods converted, would survive, and declaring that a tort action as such can never survive, Lord Mansfield stating:

> "So far as the tort itself goes, an executor shall not be liable."

The case deals with the question of a recovery for conversion by the deceased, and is no authority at all on the survivorship of actions for fraud, excepting so far as it enunciates general rules adverse to the defendant in error in the present action. Lord Mansfield concludes by stating that an action in trover does not survive because the action requires a plea of guilty or not guilty, and is therefore a tort action in form, and points out that

> "where the cause of action is a *tort* or arises *ex delictu* * * * there the cause of action dies as battery, false imprisonment, trespass, words, nuisance, obstructing lights, diverting water courses, escape against the sheriff, and many other actions of like kind."

It is true that in the argument with counsel at the beginning of the case, members of the court were

disposed to allow the action of trover to survive if there were no other remedies available but after the case was twice argued, the court unanimously held that actions in trover could in no case survive.

The reason back of the rule that a personal action dies with a person is undoubtedly the difficulty that an executor would have in disproving statements of the injured party. In a case such as the case at bar, where an agent of the defendant in error testifies to conversation and talks had with the decedent, and the lips of the decedent are closed in death and he may not even be able to show that he had never seen the property traded, or that such fact was known to the defendant in error who bought it subject to his own inspection, and the seal of death has prevented such proof, the decedent's excutor labors under a heavy handicap.

While it is also true that Lord Mansfield in the course of the first argument does remark that so far as the act of the offender is beneficial, his assets ought to be answerable and his executor therefore should be charged, nevertheless this remark constituted dicta and was effervescent in character and, as stated, he subsequently declared that the cause of action did not survive.

In the case of Phillips v. Homfray, 24 Chancery Div., 439, decided in 1883 by the Court of Appeals, almost one hundred years after Hambly v. Trott was decided, an action involving survivorship of an action brought to recover damages arising out of decedent's

use of plaintiffs' land to transport minerals, and in which the case of Hambly v. Trott was very carefully considered, the remark of Lord Mansfield was considered and declared to be dicta, Bowen, J., holding that in addition to cases *ex contractu*, there was only one other class of cases in which right of action survives, such class being those cases which are purely recupatory in character, that is, in those cases where the deceased has taken from the other party property, or its proceeds, and has enriched his own estate by such property or proceeds or value, so that in law or in equity such property belongs to the other party. In such a case the right to sue does not arise from any relationship between the parties, but is an incident to the ownership of property, and is a right which the law gives the owner of property to protect him in his ownership and possession. It is what may be termed a possessory action, the essential element of which is a present right in the property or its proceeds and the remedy granted is not damages, but the return of that which is already his, either in law or in equity. For this reason it was held in Phillips v. Homfray that where the deceased had derived an ascertainable, pecuniary benefit by certain tortious trespasses, and the plaintiff had suffered ascertainable pecuniary damages, nevertheless the action, not being to recover specific property, did not survive.

This rule is stated by Bowen, J., in Phillips v. Homfray, *supra,* at page 454, as follows:

> "The only cases in which, apart from questions of breach of contract, express or implied, a rem-

edy for a wrongful act can be pursued against the estate of a deceased person who has done the act, appear to us to be those in which property, or the proceeds or value of property belonging to another, have been appropriated by the deceased person, and added to his own estate or moneys. In such cases whatever the original form of action, it is in substance brought to recover property or its proceeds or value, and by amendment could be made such in form as well as in substance. * * * But it is not every wrongful act by which a wrongdoer indirectly benefits that falls under this head, if the benefit does not consist of the acquisition of property or its proceeds or value. Where there is nothing among the assets of the deceased that in law or in equity belongs to the plaintiff, and the damages which have been done him are unliquidated and uncertain, the executors of a wrongdoer cannot be sued merely because it was worth the wrongdoer's while to commit the act which was complained of, and an indirect benefit may have reaped thereby. * * * *It seems to us that Lord Mansfield does no more than indicate that there is a class of cases in which assumpsit can be brought against a wrongdoer to recover the property he has taken or its proceeds or value and that in such cases the action will survive against the executor.*"

In passing, it should be noted that in this same case of Phillips v. Homfray, Bowen, J., determines that no action containing an element of tort can survive, in the following language:

"We do not believe that the principle of waiv-in a tort and suing in contract can be carried further than this,—that a plaintiff is entitled, if he chooses it, to abstain from treating as a wrong the acts of the defendant in cases where, independently of the question of wrong, the plaintiff could make a case for relief."

Seven years later, in 1890 the same case, Phillips v. Homfray, 44 Ch. D. 699, was again before the courts. Sterling, J., in delivering the opinion of the court, says:

"It was decided in the case of 'Hambly v. Trott, that an action of trover was one to which the rule of law, *action personalis moritur cum persona*' applies. * * * That case was much discussed in this very case of Phillips v. Homfray upon the appeal (24 Ch. D. 439) and, after reading carefully the judgment of Mr. Justice Pearon and the judgments delivered in the Court of Appeal, it does not appear to me that the proposition of law on which Hambly v. Trott was decided was in any way disputed. It was accepted by all the judges as good law that an action of trover is one that dies with the person. The question on which the majority of the Court of Appeal differed from Lord Justice Baggallay and Mr. Justice Pearson seems to have been whether any form of action could be suggested which could be brought at law in which the damages or the sums which were sought to be recovered by means of the inquiries 2, 3 and 4 could be recovered against an executor and the opinion of the majority of the Court of Appeal was that no such action could be suggested."

In Kirk v. Todd, 21 Chan. Div. 484, the Court of Appeals said:

> "As I understand the rule at common law it was this—you could not sue executors for a wrong committed by their testator for which you could only recover unliquidated damages."

In Strattons Independence v. Dines, 126 Fed. at page 980, which is an action to recover damages against Strattons' executors for false representations made by Stratton during his lifetime, it was there held that the question of survival of the action must be determined by the laws of England, and that under the laws of England the action did not survive, the court citing Phillips v. Homfray, *supra.*

The Supreme Court of the United States, in the case of Henshaw v. Miller, 17 How, 212, 15 L. Ed. 222, in an action for damages arising out of a fraudulent misrepresentation, approves the doctrine laid down in Reed v. Hatch, 19 Pick. 47, and remarks:

> "The maxim of the common law is *'actio personalis moritur cum persona'* and as this maxim is recognized both in England and Virginia the interpretation of it in the former country becomes pertinent to its exposition or application here. In England it has been expounded to exclude all torts when the action is in form *ex delictu* for the recovery of damages and the plea of not guilty."

The court holding that the action abated upon the death of decedent.

In Reed v. Hatch, 19 Pick. 47, Shaw, C. J., says:

> "The question whether the plaintiffs can cite in an administrator and proceed with their action depends on Revised Statutes, c. 93, par. 7. It is contended that a false representation by which one is induced to part with his property by sale on credit to an insolvent person, by means of which he is in danger of losing it, is a damage done to him in respect to his personal property. But we are of opinion that this would be a forced construction and not conformable to the intent of the statute. If this were the true construction, then every injury by which one should be prevented from pecuniary gain or subjected to pecuniary loss would directly or indirectly be a damage to his personal property. But we are of opinion that it must have a more limited construction and be confined to damage done to some specific estate of which one may be the owner. A mere fraud or cheat by which one sustains a pecuniary loss cannot be regarded as a damage done to personal estate. *The action is abated at common law* by the death of the defendant, and not surviving, by force of the statute, must be deemed to stand abated."

In order then that the case survive at common law, it must be brought upon an express or implied assumpsit or else brought to recover property in the hands of the executor of the decedent.

The possibility that an action *ex contractu* is available in the case at bar is disposed of elsewhere in this brief.

The present action is not a recupatory action. Under the California decisions defendant in error had his election either to disaffirm the trade and recover back his original property, or affirm the trade and sue in damages. He has seen fit not to disaffirm the trade and not to recover his original property or its value. He has affirmed the trade, affirmed in the plaintiff in error executrix' title to the Los Angeles property and instituted an action in deceit to recover damages suffered, being the difference between the values of the two properties.

(3) *The California statutes do not provide that actions brought to recover damages for fraud committed shall survive the death of the tort feasor.*

It being the rule of the common law that an action brought to recover damages for a tort committed does not survive the death of the tort feasor, in the absence of express statute declaring such survival, the question then in the case at bar is whether the California statutes have so modified the common law as to declare that an action brought to recover damages for fraud survives the death of the tort feasor.

On the threshold of the analysis, we call attention to the fact that California Code provisions relating to actions surviving *to* the representatives of the injured party are different from those relating to actions surviving *against* the estate of a decedent, although as heretofore stated, the common law rule as to each character of actions was the same.

Sections 1582 and 1583 of the Civil Code of Procedure, and section 954 of the Civil Code, specify the instances in which the rule of the common law is modified as to the survivorship *to* the representative of the injured party. While sections 1582 and 1584 specify the instances in which the rule of the common law is modified as to survivorship *against* the estate of decedent in actions *in personam.*

Section 1582 of the Civil Code of Procedure provides:

> "Actions for the recovery of any property, real or personal, or for the possession thereof, or to quiet title thereto, or to determine any adverse claim thereon, and all actions founded upon contracts, may be maintained by and against executors and administrators in all cases in which the same might have been maintained by or against their respective testators or intestates."

In the instant case, an action cannot be maintained against the executrix under this section, because the action is not one for the recovery of any property, real or personal, or for the possession thereof, or to quiet title thereto, or to determine any adverse claim thereon, and neither is the action founded upon contract.

Section 1584 provides:

> "Any person or his personal representative may maintain an action against the executor or administrator of any testator or intestate who in his lifetime has wasted, destroyed, taken, or carried away, or converted to his own use, the goods or

chattels of any such person, or committed any trespass on the real estate of such person."

This action is not one where the testator, in his lifetime, has wasted or destroyed, or taken or carried away, or converted to his own use, the goods or chattels of the defendant in error, or committed any trespass on the real estate of such person and hence the cause cannot be said to survive under the last mentioned section.

Inasmuch as the rules of the common law are in force except as they have been modified by an express provision of the statute, and inasmuch as there is no express provision of the statute declaring that an action for fraud does survive except in cases of conversion and trespass, it must be determined that the common law as to actions in fraud is in force in this state, and that the action abated by the death of Otho S. Houston, and accordingly the complaint does not state facts sufficient to constitute a cause of action.

In the case of Harker v. Clark, 57 Cal. 245, the complaint alleges that defendant's intestate in his lifetime, without probable cause, commenced a suit against plaintiff, and procured an order for the issuance of a writ for the arrest, detention and imprisonment of the plaintiff, by virtue of which writ, she was arrested and imprisoned until such arrest and imprisonment was adjudged to be without authority of law; that in procuring her release, she was compelled to and did employ an attorney, and paid him for his services therein five hundred dollars. The action was

brought against defendant as administratrix. The demurrer was sustained. The court says:

> "This action is clearly within the maxim, 'a personal right of action dies with the person,' unless the right of action has been kept alive by some statute. (Broom's Legal Maxims, p. 869, etc; 6 Wait's Prac. 329, and cases cited there.) The statute under which the plaintiff claims a right to recover is Art. 1584, Code of Civil Procedure, by which a person 'may maintain an action against the executor or administrator of any testator or intestate who, in his lifetime, has wasted, destroyed, taken or carried away, or converted in his own use the goods or chattels of any such person.' The intestate Clark did not, by the arrest or imprisonment, or by thereby compelling the plaintiff Mary A. Harker to pay $500 to her attorney, waste, destroy, take or carry away, or convert to his own use the goods or chattels of said Mary A. Harker."

In other words, the court does not extend the right of survivorship beyond those cases where survivorship is clearly permitted by statute, and it is thus clear that a personal right of action dies with the person, unless the action has been kept alive by some statute and that the Supreme Court of California holds that section 1584 of the Code of Civil Procedure will not be construed to cover cases which it does not in terms affect.

In the case of Hannon v. Harper, 9 Cal. App. 260, two actions were consolidated on appeal. The first was an appeal from a judgment denying plaintiff's peti-

tion for a writ of review directed to defendants, as police commissioners, based upon the alleged fact that the board had unlawfully revoked an employment agency license under which Crowley was conducting an employment agency. The second action was an appeal from a judgment denying plaintiff's petition for a writ of mandate. Subsequent to the appeal, Crowley died, and application was made to dismiss the appeal upon the ground that said right of action was not one that survives to the personal representatives of said deceased. The court says, on page 261:

> "Neither case presents a cause of action which survives to or can benefit the estate of deceased. Conceding that deceased was entitled to have the proceedings of the board of police commissioners, whereby they revoked his license, set aside and annulled, and likewise conceding that he was entitled to have issued to him the license as prayed for in his petition for writ of mandate, they were nevertheless personal rights and privileges not assignable and not assets of his estate. (Buck's Estate, 184 Pac. 57 (64 Am. St. Rep. 816, 39 Atl. 821).) The proceedings belong to that class of actions which, upon the death of plaintiff, abate without right of revivor in the personal representative of the deceased. (Booze v. Humbird, 27 Md. 1.)"

In the case of Kramer v. San Francisco Market Street R. R. Co., 25 Cal. 435: An action was brought to recover damages for the death of plaintiff's son. It was held, first: That a civil action for the death

of a person, *per se,* cannot be maintained by any one at common law; that a personal action dies with the person, and that unless a right of action is given by statute, such right of action cannot be maintained, and it was there held that inasmuch as the statute only gave the right of action to the personal representatives of the deceased, that an action for the death of a child would not lie in favor of the father.

In the case of Fowden, Special Administrator v. Pacific Coast Steamship Co., *et al.,* 149 Cal. 151, one Mark Fowden, while a passenger on defendant's steamer, was injured through defendant's negligence. Judgment was rendered in his favor. Subsequent to the entry of judgment and the order on motion for new trial, the plaintiff died, and Frank Fowden, as special administrator of his estate, was substituted. The doctrine of Harker v. Clark, 57 Cal. 245, was reaffirmed, although it was held that the rule had no application because judgment was entered in fact during the lifetime of Mark Fowden, the court stating:

> "It is urged that plaintiff's action being based on negligence resulting in his personal injury, his death abates the acton and vacates everything done therein. Defendant thus invokes the application of the common-law rule, *actio personalis moritur cum persona*, and it may be conceded that the rule applies to such a cause of action as is stated in the complaint herein, and that no change in the common-law rule material to such a cause of action has been made by statute in this state. (See Harker v. Clark, 57 Cal. 245.)"

As heretofore stated, section 1584, C. C P., permits the survival in cases of conversion, and Coleman v. Woodworth, 28 Cal. 567, declares that an action against the administrator for the conversion of personal property by the decedent, survives, because such survivorship is specifically provided for in such cases by statute.

The case of Henderson v. Henshaw, 54 Fed. Rep. p. 320, relied upon by plaintiff in the court below, was an action wherein the *plaintiff,* who had been defrauded, died pending the suit, and it was held that under the Civil Code, section 954, the action survived in favor of his personal representatve. It will be observed that this action brought by the personal representative was an action *in favor* of the representative of a person defrauded and *not against* the representative of the man who in fact perpetrated the fraud. It will be remembered that the statutes relative to survivorship of actions in favor of a personal representative are not identical with the statutes involving survivorship against the representative of a decedent. Section 954, C. C., upon which this decision was based, relates only to survivorship in favor of the personal representative whose rights of property have been violated. The decision in question is not in any way helpful in determining what actions survive *against the* representatives of a person who has perpetrated a fraud.

In McCord v. Martin, 34 Cal. App. 129, our position is fortified by the declaration of the court:

> "It is true, as the respondents contend, that naked actions for fraud and deceit are not the subject of assignment under long and well settled rules of equity."

In that case, however, it was held, in substance, that the defendant had fraudulently received a sum of money which equitably belonged to the plaintiffs' assignors, and accordingly, plaintiffs' assignors could properly assign that which equitably belonged to them.

In Clark v. Goodwin, 170 Cal. 527, it was held that an action for damages for the death of the husband of plaintiff, given by section 377 of the Code of Civil Procedure, cannot be maintained against the personal representatives of the person causing such death, and that the action abated upon the death of the wrongdoer prior to suit brought. The court cited with approval Harker v. Clark, *supra,* saying:

> "Nothing was more firmly settled at common law than the rule that such a cause of action, except under certain circumstances which do not exist here, does not survive the death of the person to or by whom the wrong was done. This rule exists here, excepting insofar as it has been modified or abolished by statute," citing and quoting from Harker v. Clark.

The court further analyzes section 1582 of the Code of Civil Procedure and declares that it

> "is limited by its terms to actions for the recovery of property or the possession thereof or to quiet title thereto, or to determine any adverse claim thereon, and all actions founded upon contracts."

Fox v. Hale & Norcross Silver Mining Co., *et al.*, defendants, reported in 108 Cal. at page 478, and also in 108 Cal. 369. In this case, the decision of the court was rendered on the 26th day of May; the defendant, Hobart, died on the second of June. Thereupon his executors were substituted as defendants, and the trial court ordered its findings and judgment thereon to be entered against Hobart, *"nunc pro tunc"* as of the 26th day of May. The Supreme Court held, in 108 Cal. at 478, that it was proper that *"nunc pro tunc"* findings should be entered, and that thereupon a judgment should have been entered against the other defendants. The court further remarks:

> "The right of the plaintiff to maintain the action against the executors of Hobart is fully authorized by section 1584 of the Civil Code of Procedure," (relating to conversion) "(see, also, Coleman v. Woodworth, 28 Cal. 567)" (also an action involving a conversion). "It falls within the rule given by Lord Mansfield in Hambley v. Trott, 1 Cowp. 371, 'Where property is acquired which benefits the testator, there an action for the value of the property shall survive against the executor.'"

in which action, it will be remembered, the court declared that an action in trover would not survive, but indicated that actions in assumpsit should survive.

The foregoing language constitutes the entire reasoning of the court on the subject of survivorship. The facts are rather complicated and will be found set forth in 108 California Reports, page 369. In a word, Hobart, the decedent, Hayward and Levy, his

codirectors, were parties to a scheme by which they converted assets of the Mining Company to their own use. The court held that the action survived as coming within section 1584, C. C. P., and within the doctrine enunciated in Coleman v. Woodworth, *supra,* both of which relate to and provide for survivorship in cases of conversion. Although even such holding was unnecessary to the decision of the case because the court further held that a *nunc pro tunc* judgment was properly entered as of the date of the decision, where at the time of the decision the decedent defendant was alive.

It is thus clear that the California courts have held that at common law, in the absence of some statutory provision, actions to recover damages for a tort do not survive and that the statutes of California as construed by the Supreme Court of California do not provide for the survivorship of actions in deceit for a fraud perpetrated.

II.

The Complaint, Furthermore, Does Not State a Cause of Action if We Are to Assume That the Action Is Based on Contract, in That There Is No Allegation and No Affirmative Finding That a Claim Was Filed Against the Estate of Otho S. Houston Prior to the Institution of the Action.

The complaint does not allege that a claim was filed against the estate prior to suit brought and there is

no finding to that effect. If the cause of action is to survive at all, it must be because it is founded upon contract. Only in case it is founded upon contract can it be made to be brought within section 1584, C. C. P., *supra*. Assuming that the action founded in contract, it became the duty of defendant in error to present a claim to the administrator for its allowance.

Section 1493, C. C. P., provides:

> "All claims arising upon contracts, whether the same be due, not due, or contingent, and all claims for funeral expenses and expenses of the last sickness must be filed or presented within a time limited in the notice, and any claim not so filed or presented is barred forever; * * *."

And it is the law that no action can be maintained thereon unless such claim has been presented before the action was begun.

Section 1500, C. C. P., provides:

> "No holder of any claim against an estate shall maintain any action thereon, unless the claim is first filed with the clerk, or presented to the executor or administrator, except in the following case: An action may be brought by any holder of a mortgage or lien to enforce the same against the property of the estate subject thereto, where all recourse against any other property of the estate is expressly waived in the complaint, but no counsel fees shall be recovered in such action unless such claim be so filed or presented."

And a cause of action is not stated unless it is averred that a claim has first been presented to the clerk or filed with the administrator.

Burke v. Maguire, 154 Cal. 462;
Morse v. Steele, 149 Cal. 304;
Pearson v. Parsons, 173 Cal. 339;
Reed v. Reed, 178 Cal. 187.

As was stated in Burke v. Maguire, *supra,*

> "A complaint against an estate, stating a cause of action sounding in contract, which does not aver that a claim for the cause of action sued on has been thus presented to the administrator, fails to state a cause of action."

In the case of Morse v. Steele, *supra,* an action brought against the executrix for damages in the sum of $8000.00 for breach of contract, the court says, on page 305:

> "To meet this, appellant contends that the cause of action set forth in the complaint is not for breach of contract, but is for tort pure and simple, and that the presentation of a claim is therefore not necessary. This position is untenable."

In Pearson v. Parsons, 173 Cal. 339, it was held that unless a claim for damages on account of a breach of the contract was included in the claim presented to the administrator, that evidence thereof was properly excluded. This was an action against the administrator of a decedent for damages for failure to deliver certain trees as provided by contract, and for dam-

ages caused by the fraudulent and negligent action of decedent in failing to have on hand the trees. On the second trial, the court below was of the opinion that damages for the latter course, that is, the fraudulent action in not having the trees on hand, was not included in the claim presented to the administrator, and that evidence could not be received in support of a demand for a claim not so presented. It was held that the lower court was correct in its conclusion that the claim presented to the administrator did not include the demand for damages caused by the negligence of the vendor whereby he did not have the trees ready for delivery at the time of the demand and properly excluded the evidence.

In Reed v. Reed, 178 Cal. 187, an action was brought against the administrator of the estate and was based upon the allegation that plaintiff had given decedent $2250.00 as the purchase price of certain stock in a corporation, that the corporation was in fact insolvent, and the stock worthless, but the decedent had represented that it was of great value and worth the price, and that by that means sold the stock to her; and that decedent further represented that he considered the money a trust fund and would guarantee plaintiff against loss, that if the money were lost he would repay the money so paid by plaintiff; that the representations were untrue and the stock worthless. No claim was filed against the estate. The court says:

> "It is well settled that a suit against an executrix to enforce a money demand upon contract

cannot be maintained unless a claim therefor is presented to the executrix and is rejected prior to the beginning of the action. The most that can be said of this complaint is that it states a cause of action for money upon an implied contract against the decedent. It is, therefore, insufficient because of the failure to allege the presentation of the claim."

III.

There Is Absolutely No Warrant for the Judgment Against Elizabeth Houston as an Individual. The Complaint Does Not State any Cause of Action Against Her on any Possible Theory, and the Findings Do Not Support any Judgment Against Her as an Individual.

The complaint does not allege, and the findings do not find that Elizabeth Houston made any fraudulent misrepresenations or in any way participated therein, nor does it appear that she has received any of the property conveyed to the deceased or has derived any benefit from the alleged fraudulent transaction. It is almost too clear for argument that to hold one liable in an action for deceit, he must be connected in some manner with the fraudulent transaction. The rule is correctly stated in 20 Cyc. 84, as follows:

> "A person cannot of course be held liable for a fraudulent misrepresentation unless he made it himself or authorized another to make it for him, or in some way participated therein."

The same principle is also stated in 12 Ruling Case Law, Sec. 149:

> "Relief on the ground of fraud can be had only against those who are shown to have been parties thereto. * * *"

Nor can one be effected by false representations which are neither inducted by him nor made with his knowledge, nor can he be deprived of any right by fraudulent acts in which he does not participate. To warrant relief in any case, therefore, it must appear that the fraud was committed either by the person sought to be charged or by his procurement or with his authority.

Civil Code, Sec. 1572.

IV.

The Judgment Against Elizabeth Houston as Executrix Is Excessive to the Extent of Twenty-Seven Hundred Sixty Dollars Thereof. Defendant in Error Recovered Judgment Against Elizabeth Houston as Executrix Not Only to the Extent of the Difference Between the Reasonable Value of What He Parted With and the Reasonable Value of What He Received, but Also to the Extent of Twenty-Seven Hundred Sixty Dollars Which Consisted of the Rental Value of Defendant's in Error Demised Premises From the Date of the Trade to the Date Suit Was Filed.

It was found in paragraph XIV of the findings that the difference in value between the property defendant

in error traded and the property he received is $7,000; that nevertheless the court found as a conclusion of law that the defendant in error had been damaged not only in the sum of the aforesaid $7000, but also in the further sum of $2760, being the rental value of the premises traded by him from the date of the trade to the date of filing complaint. Judgment was ordered rendered accordingly, and was so rendered.

The well settled doctrine is that in actions for damages for fraud arising out of exchange of properties, the measure of damages is the "difference between the reasonable value of what the defrauded party parted with and the reasonable value of what he received."

Rockefeller v. Merritt, 76 Fed. 909;
Graf v. Holcombe, 277 Fed. 687, 691;
Cross v. Bouck, 175 Cal. 253, 256;
Sigafus v. Porter, 179 U. S. 116 (21 Sup. Ct. 34).

These cases all lay down the doctrine stated as constituting the measure of damages and as fixing the detriment which defendant in error suffered by reason of the trade and exchange. Notwithstanding that the measure of damages is as stated, additional damages were awarded which equaled the rental value of the premises from the time of the alleged fraud to the date of suit.

The counsel for defendant in error, in preparing his findings and judgment, merely confused the law applicable to legal and equitable remedies, and the

court undoubtedly assumed that the findings and judgment were properly prepared. Had counsel filed an action in rescission to rescind the trade, the court, in ordering a rescission might very properly have ordered an accounting and awarded defendant in error the rentals in connection with such rescission. But he was entitled to no such relief in a law action.

Respectfully submitted,

LUCIUS K. CHASE,

Attorney for Plaintiff in Error.

No. 4038.

IN THE

United States
Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

Elizabeth Houston, as Sole Beneficiary Under the Will of Otho S. Houston, Deceased, and as Executrix of the Estate of Otho S. Houston, Deceased,

Plaintiff in Error

vs.

J. M. Rosborough,

Defendant in Error

BRIEF OF DEFENDANT IN ERROR.

WESTALL AND WALLACE,
ROBERT M. FULTON,
By JOSEPH F. WESTALL,
Attorneys for Defendant in Error.

Parker, Stone & Baird Co., Law Printers, 232 New High St., Los Angeles.

No. 4038.

IN THE

United States
Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

Elizabeth Houston, as Sole Beneficiary Under the Will of Otho S. Houston, Deceased, and as Executrix of the Estate of Otho S. Houston, Deceased,

Plaintiff in Error

vs.

J. M. Rosborough,

Defendant in Error

BRIEF OF DEFENDANT IN ERROR.

STATEMENT OF THE CASE.

Plaintiff in error is correct in stating (Opening Brief of Plaintiff in Error, p. 1]:

"This is an action in deceit, instituted by defendant in error, Rosborough, against Elizabeth Houston, as sole beneficiary under the will of Otho S. Houston, deceased, and also against Elizabeth Houston as executrix of the estate of said Otho S. Houston, deceased, to recover damages for an alleged fraud arising out of misrepresentations made by Otho S. Houston in his

lifetime, and thereby inducing Rosborough to trade certain real estate in Los Angeles for a trust deed secured by certain property in Texas belonging to Houston."

It should be noted, however, that while the complaint [Tr. of Rec., p. 7] is entitled as against plaintiff in error both individually and as executrix, it does not pray [Tr. of Rec., p. 24] judgment against defendant in any particular capacity, and the findings [paragraph VIII thereof, Tr. of Rec., p. 59] and the judgment entered thereon [Tr. of Rec., p. 61] are against plaintiff in error as executrix and not individually (except as to costs) the judgment reading [Tr. of Rec., p. 61], "that said claim set forth in the complaint be and the same is hereby allowed as a claim *against said estate and that the same be paid in due course of administration by defendant.*" (Our italics.)

Plaintiff in error is, therefore, not affected by the judgment for damages except insofar as it reaches assets coming to her hands as executrix of the estate. As to costs, while liable individually (as we shall see in its proper place in our discussion to follow) she is entitled to reimbursement against the estate.

The Issues Defined and Classified.

As there is no evidence nor bill of exceptions contained in the transcript of record on this appeal, it is clear (as we shall show in our argument to follow) that *no question of fact* is presented for decision on

this appeal. In other words, the facts as recited in the opinion and findings of the trial court not being questioned, nor capable under the state of the record of being controverted *must be accepted by this court as true.*

At the threshold we are met by an issue which, in human interest involved in the struggle of man-made law to square with natural justice or of the artificial to match with the devine, compares with the four technical points comprising the entire argument of plaintiff in error as the snowy peak of Shasta unto four ant hills on the outskirts of the village of Hog Hollow. That issue, large enough to fill every court room in the land, is this: Shall "grievous fraud" coupled with an undoubted "fraudulent intent and purpose" [Trial Court's Opinion, Tr. of Rec., p. 68] "demonstrated in the clearest fashion" innocently relied upon, and which resulted in great financial damage to the party so relying and to corresponding great profit to the guilty perpetrator and his estate, as found by the trial court, all of which facts *are not and cannot be controverted on this appeal* be allowed to prevail, and the fruits of such admitted fraud be retained as enrichment of the estate of the wrongdoer?

Of the thirty-five pages of the opening brief of plaintiff in error over seven pages are devoted to a statement of the case and quotation of the assignments of error. Of the only twenty-eight pages of argument, twenty-one are devoted to the question of whether or not the cause of action survives. The remaining seven pages of argument are divided among the other three

points comprising all of the contentions of plaintiff in error on this appeal. This division of the opening brief of plaintiff in error will be sufficient present support for our assertion that the only point urged with any seeming seriousness on this appeal is the mere question of law as to whether or not the cause of action survives, and we are sure that the court will find a determination of such question will practically dispose of this appeal.

ARGUMENT.

No Question of Fact Is or Should Be Considered on This Appeal for the Reason That No Exceptions nor Bill of Exceptions Are Contained in the Transcript of Record on Appeal.

This is so elementary that it is perhaps superfluous to argue. (Foster's Federal Practice (6th Ed.), Secs. 453, 479, and authorities there cited; Montgomery's Manual of Federal Procedure (2nd Ed.) sections 596 and 597, citing R. S. U. S., Secs. 700 and 953.) Plaintiff in error's fourth contention (Opening Brief of Plaintiff in Error, page 5,) seems to suggest or imply in its statement a question of fact as to whether or not the judgment was excessive. Of course, any such fact could not be determined without reviewing evidence on the bill of exceptions.

The Trial Court Was Correct in Its Rulings on Demurrer and on the Trial That the Cause of Action Survives.

As we have pointed out above, three-fourths of the argument of plaintiff in error in opening brief is devoted to the matter of survivorship. The point was raised by demurrer when the complaint was filed. It was at that time carefully considered by the trial court who overruled the demurrer and found that the cause of action *did* survive. It was again even more carefully considered on the trial, as the opinion of Judge Bledsoe shows. In its opinion, the trial court [Tr. of Rec., p. 69], says:

> "The point is urged again that the action may not be maintained against the executrix of Houston. I find nothing in the statutes of California denying the right of a plaintiff in such a case to proceed against the executrix. The property actually obtained by the fraud of the deceased or its fruits having come into the hands of the executrix now serves to enrich the estate in her hands. Right and justice would seem to demand that such an unlawful enrichment should not be permitted and that the value of the thing wrongfully acquired and wrongfully retained should be recoverable. No statutory inhibition existing, I am persuaded that the rule of the common law is to be followed. From a careful reading of the case of Hambly v. Trott, 1 Cowp. 371, which is very illuminating in its reasoning, I understand the rule to be at common law, that the party defrauded may seek relief as for the value of the thing ob-

tained even as against the executor. Here, as the result of the fraud, the estate of the deceased has been enriched and the effort merely is to obtain that which has thus been wrongfully secured and retained. See also to the same effect, 1 C. J. 174."

After a careful review of every angle of the question as presented in the opening brief of plaintiff in error it is believed that we cannot improve upon the argument on this question made in our brief filed in the trial court, which reads as follows:

DOES THE CAUSE OF ACTION SURVIVE?

"This question has already been twice decided in the affirmative by this court. First, it was the principal question raised upon the demurrer to the complaint when, after a lengthy argument and careful consideration, the demurrer was overruled. Again it was fully presented and reconsidered at the opening of the trial of this case, when it was again similarly decided. Notwithstanding that the question had thus been doubly passed upon by this court, counsel on final argument claimed the indulgence of the court for a third consideration, and now again presents a lengthy discussion of the subject in 'Defendant's Opening Brief.'

Except in the interest of economy of the court's time, we have not the slightest objection to any amount of reconsideration of the subject, as we are confident that the more thorough the re-examination of the grounds for the decision, the more firm will be the conviction that the court's decision on demurrer was sound, and that it cannot be successfully assailed.

Considerably more than half of the seven pages of counsel's discussion of this question is devoted to the citations and consideration of authorities applying the common law rule that there is no survivorship apart from the statute against the estate of a decedent guilty of fraud.

There seems to be no doubt that this was the *general rule* at common law, and we do not question counsel's discussion of the authorities applying this general rule. It is, however, subject to important exceptions which counsel apparently has overlooked. One of these exceptions is mentioned in the case of Fox v. Hale and Norcross, S. M. Co., 108 Cal. 478, which was, like the case at bar, an action against an executor for fraud of his decedent and relating—not to personal property—but [like the case at bar] to real property in which the court at page 483 quotes Lord Mansfield to the effect that 'where the property is acquired which benefits the testator, there an action for the value of the property shall survive against the executor.' This decision has never been reversed, nor have the grounds upon which it was based ever been questioned, so far as we can learn: it is precisely in point and as a further consideration will show is decisive of the question now before the court. The *general rule* of the common law urged by counsel, minus the exception, IS NOT the law of California.

The principal fallacy of counsel's argument consists in the assumption that the general rule was without exceptions, except as created by statute; and in over-

looking the *most pertinent decisions recognizing such exceptions and construing the statutes.*

One of the most important decisions to be considered in this connection is the case of Fox v. Hale and Norcross S. M. Co., mentioned *supra* (two opinions in the same case, the first at 108 Cal. 369 and the second at 108 Cal. 478).

Let us first, however, summarize counsel's argument and then measure it by the law of this Fox case. Counsel's whole argument may be reduced to this:

> 'The common law (overlooking the exception) that the cause of action did not survive is in force in this state, except insofar as modified by statute. The only modification of said common law is section 1584 of the C. C. P., which reads:
>
> ' "1584. Any person or his personal representatives may maintain an action against the executor or administrator of any testator or intestate who in his lifetime has wasted, destroyed, taken, or carried away, or converted to his own use, the goods or chattels of any such person, or committed any trespass on the real estate of such person." '

Counsel's argument then proceeds:

> 'The fraud complained of in the case at bar does not come within the language of the statute in that Houston neither (1) wasted; (2) destroyed; (3) took; (4) carried away; (5) converted to his own use goods or chattels of plaintiff, or (6) committed any trespass on the real estate of plaintiff.'

Now let us consider the nature of the frauds which sustained the judgment in the Fox case. They consisted in various things not coming literally within the statute. Note particularly that the code section under consideration (C. C. P. 1584) refers entirely to *personal property* except in the case of trespass to real estate. There is, of course, no question of trespass in the case at bar, and counsel's argument resolves itself into this: It is not claimed that Houston by any fraud and deceit deprived Rosborough of *personal property;* Rosborough is complaining of being deprived by the fraud and deceit of Houston of *real property.*

Now to answer this argument: The fraud in the Fox case consisted, among a number of other things, of (1) mining, transporting, and milling low grade or worthless ores, misappropriating said ores; (2) insufficiently milling the high grade ores and leaving a large amount of gold and silver in the tailings, afterwards working them over and appropriating the same. Counsel has no doubt assumed that these minerals and ores being mined under this fraudulent system were *personal property* and that therefore the judgment could be sustained under section 1584 of the Civil Code. This assumption, however, overlooks the language of the Political Code, section 3617, in which it is enacted that the term 'real estate' includes: 'all mines, *minerals*, quarries, in and under the land.' When, therefore, defendants in the Fox case mined and transported, or wasted or carried away ores or

minerals, they were appropriating, wasting, and carrying away—not personal property—but real property. (They were not committing any trespass to real property, because in lawful possession of the same and performing ostensibly the duties of their employment.) [The action was not to recover any specific real property but damages for fraud.] Literally, section 1584 of the C. C. P. therefore does not and cannot sustain the judgment in the Fox case. But remember that the law of California consists not only of the code sections under consideration, but of the *decisions of the court of California construing them.* For the sake of argument let us grant that the interpretation of the California court in this Fox case is forced—let us say, even, that it is an example of judicial legislation where the mighty arm of the court forges the work of the Legislature to square with justice and to avoid injustice—nevertheless *it is the law of California* and should be followed by this court. However, this decision rests firmly *on the exception to the common law rule which the court recognizes* [whether consistently or otherwise, and whether such assumed exception was *dicta* or not] as stated by Lord Bansfield in Hambly v. Trott, Cowp. 371: 'Where property is acquired which benefits the testator, there an action for the value of the property shall survive against the executor.'

In this Fox v. Hale and Norcross case, defendant had by fraudulent conspiracy and deceit involving numerous and complicated methods, deprived plaintiff

of what the law defined as real estate, which is exactly what is complained of in the case at bar, and it was sought not to recover any specific ore but *damages*. The court held that under the law of California the action survived against the executor. We submit that the rule is clearly applicable to the case at bar.

It is believed that counsel has underestimated the value of the decision of our own Court of Appeals (opinion by Judge Morrow) in Henderson v. Henshall, 54 Fed. 320, the third paragraph of the syllabus of which is as follows:

> 'Survival of Actions—Actions for Deceit.
>
> 'Under Civil Code, Cal. Sec. 953, 954, defining a thing in action, and providing that, when arising out of a right of property, on the death of the owner it passes to his personal representatives, a cause of action for damages by reason of false representations as to the value of land, whereby one is induced to part with his land in exchange, will survive.'

The sections of the code referred to in this decision are as follows:

> '953. A thing in action is a right to recover money or other personal property by a judicial proceeding.'
>
> '954. A thing in action, arising out of the violation of a right of property, or out of an obligation, may be transferred by the owner. Upon the death of the owner it passes to his personal representatives, except where, in the cases provided in the Code of Civil Procedure, it passess to his devisees or successor in office.'

The peculiar force and applicability of the decision in the Henderson case arises from the fact that (1) *one of the important tests of survivorship is assignability;* (2) the reasoning of the court shows the liberality with which the old common law technicalities are disregarded.

In connection with our analysis and consideration of this Henderson case, let us first call the court's attention to the case of Graves v. Spier, 58 Barbour (N. Y.), 349, where it was held (5th paragraph syllabus):

> 'A cause of action for fraud in the purchase and sale of real estate survives to and against the personal representatives of a deceased party and the transaction is therefore assignable, so that the assignee may maintain an action upon it.'

As showing the inseparability of assignability and survivorship, the court at page 386 says:

> 'It is quite difficult to see why a cause of action growing out of a fraud, practiced by one upon another in the exchange or sale of property, by which the defrauded party loses his property, and which is a species of tort, is not also assignable. All cases agree that it is assignable if the cause of action survives, and may be maintained by or against the personal representatives of the parties to the transaction. We have seen that a cause of action like the one before us does survive. * * * I conclude, therefore, that the action is maintainable by the plaintiff as assignee.'

Now referring again to this Henderson v. Henshall case, *supra,* the court holds in effect broadly that an action for the recovery of damages on a land trade comes within section 954 of the Civil Code as 'a thing in action arising out of the violation of a right of property or out of an obligation * * *.' This being so it is assignable and being a thing in action capable of assignment it necessarily survives.

Note particularly the reasoning of Judge Morrow in the case under consideration (Henderson v. Henshall, at page 331):

> 'It is urged that these provisions do not in express terms distinguish those things in action that survive from those that abate upon the death of the owner. There may be some question as to the survival of a thing in action arising out of a personal injury, but the thing in action in this case arises out of the violation of a right of property, which, by the express language of section 954 of the Civil Code, passes to the personal representatives of the deceased. Moreover, section 4 of the Civil Code provides the following rule of construction for its provisions:
>
> ' "The rule of the common law that statutes in derogation thereof are to be strictly construed has no application to this code. The code establishes the law of this state respecting the subjects to which it relates, and its provisions are to be liberally construed, with a view to effect its objects and to promote justice."
>
> 'If we follow this rule, and construe the provisions of the code liberally, with a view to effect

> its objects and to promote justice, we must determine that the cause of action in this case survived to the administrator as assets on his hands, because the wrong which is the subject of the action was not merely a personal injury inflicted upon the decedent, and the damages claimed the measure of her bodily or mental suffering, but the wrong was to the estate of the original plaintiff, whereby it became diminished in value. "It is now the general American doctrine that all causes of action arising from torts to property, real or personal,—injuries to the estate by which its value diminished,—do survive and go to the executor or administrator as assets in his hands." Pom. Rem. & Rem. Rights, Sec. 147. We think, upon principle as well as authority, the cause of action in this case survived to the administrator. Judgment affirmed.'

This reasoning, we submit, applies with equal force to the circumstances in the case at bar.

An illustration of liberal construction of a statute supposed to be in derogation of the common law, but really not so because of the exception noted by the court in Fox v. Hale Case, *supra*, is contained in the decision of the court in Thornton and Thomas Co. v. Bretherton, *et al.*, 32 Montana 80. A sufficient statement of the facts of this case is contained in the first paragraph of the opinion which is as follows:

> 'This action was commenced to recover damages in the sum of $22,050 for the wrongful acts of defendants Bretherton and one John D. Thomas, in his lifetime, in procuring in a certain suit in

the District Court of the county of Silver Bow, the appointment of a receiver of the business and property of Thornton and Thomas Mercantile Company (hereinafter referred to as 'Company'), and causing loss of its accounts and merchandise.'

The court says:

'It is the contention of appellants that the right of action, so far as it relates to Mattie A. Thomas, as executrix, abated with the death of John D. Thomas, and that the maxim of the common law, 'a personal right of action dies with the person,' has not been modified by statute. Section 2733 of the Code of Civil Procedure is as follows: 'Any person or his personal representatives may maintain an action against the executor or administrator of any testator or intestate who in his lifetime has wasted, destroyed, taken, or carried away, or converted to his own use the goods or chattels of any such person, or committed any trespass on the real estate of such person.' The courts have not been uniform in the interpretation of laws of this nature, but we have arrived at a satisfactory conclusion. The section, *supra,* was enacted in 1895, and is the same as section 1584 of the Code of Civil Procedure of California.'

After an analysis and consideration of the decisions of Coleman v. Woodworth, 28 Cal. 568; Fox v. Hale & Norcross, *supra,* and noting that the Supreme Court of Utah has followed these authorities in Warren v. Robinson, 21 Utah, 445, the court concludes:

'We accept this construction of our statute which has so long prevailed in California, and affirm the

ruling of the court below that this action can be maintained against Mattie A. Thomas, as executrix of John D. Thomas.'

Let it be noticed particularly in considering this Montana case that while the wrongful act complained of caused damage and loss to the plaintiff, it did not come within the literal wording of the statute, in that the wrongdoer did not waste, destroy, take, or carry away, or convert to his own use any goods and chattels of plaintiff. This clearly shows a tendency to liberality rather than strictness and indicates that the common law has other exceptions than those contained in the code provision.

In Warren v. Robinson, 21 Utah 429, it was shown that the deceased 'had been negligent and inattentive to duty, and that in consequence thereof, loss resulted.' Utah had a statute similar to our own and the court decided: 'In such a case the action survives and may be maintained against the executrix.' Citing Fox v. Hale & Norcross S. M. Co., 108 Cal. 475; and Coleman v. Woodworth, 28 Cal. 567 as authorities for its decision.

Surely it is clear from the foregoing authorities that liberality rather than strictness should govern in the interpretation of this law; but, we submit, even with the most strict interpretation the action survives, for the exception stated by Lord Mansfield rather than the general rule of common law applies."

In 1 Corpus Juris, page 185, Sec. 340, it is said:

> "Where, however, the estate of the injured person was diminished by the wrong, his personal representatives might, in some cases, even at common law, recover for the injury; and where the estate of the wrongdoer was benefited, his personal representatives were liable. But in order that a right of action arising out of a tort should survive against the executor or administrator of the tort feasor it was generally held essential that the latter should, by the wrongful act, have acquired specific property by which, or by the proceeds of which, the assets in the hands of his personal representative were increased. It was not enough that the benefit resulted or that expense was saved to the tort feasor, by which his estate was larger than it otherwise would have been. But where there was a duty as well as a wrong an action survived against the executor."

Kerr on Fraud and Mistake (5th Ed., 1920) states the law as follows:

> "In all cases of fraud the hand of the court is not arrested by the death of the wrongdoer. An action survives against the executor when the wrong complained of has benefited the estate of the deceased." (Citing the following cases: Rawlins v. Wickham, 3 D. & J. 304, 28 L. J. Ch. 188; Bresley v. Mousley 4 D. & J. 78, 28 L. J. Ch. 620, 124 R. R. 164; Walsham v. Stanton, 1 D. J. & S. 690, 137 R. R. 342; New Sombrero Phosphate Co. v. Erlanger, 5 C. D. 74, 46 L. J. Ch. 425.)

As in the argument before the trial court, plaintiff in error in the opening brief has devoted much time in

attempting to establish the general rule at common law (which never was controverted by us) that actions *ex delicto* did not survive, but principally the attempt has been to minimize or ignore the exceptions clearly indicated by the immediately foregoing authorities. A careful study of the cases from which counsel's excerpts were taken will show clearly why the exceptions we are contending for did not apply in those cases.

A circumstance, the importance of which cannot be over-estimated, but concerning which plaintiff in error in the opening brief has not seen fit to comment, is that (as appears in our above quoted argument in the trial court) *both of the states of Utah and Montana have statutes similar to 1584 C. C. P. of California and the Supreme Courts of both of those states (Warren v. Robinson,* 21 Utah 428, *at near the bottom of page 445 and Thornton v. Bretherton,* 32 Montana 80) *have cited, applied, and followed the interpretation of that code section as found in Fox v. Hale & Norcross,* 108 Cal. 478, *holding that an action for fraud against an executor may be maintained—in other words that the exception of the common law upon which we insist prevails. Notwithstanding any possible superficial plausibility of counsel's reasoning, the stubborn fact is that the highest courts of three states having similar statutes have concurred in holding that neither the general rule of the common law nor the code provision under consideration is applicable but that an action of the character of that at bar does survive against the executor.*

At pages 28 and 29 of the opening brief of plaintiff in error we find a discussion of this case of Fox v. Hale & Norcross Silver Mining Company, 108 Cal. at page 478, the evident intent of which is to make it appear that such case is not in point. For instance, on page 29 of said brief we find counsel stating that the holding as to survivorship was unnecessary to the decision in the case because the court held that a *nunc pro tunc* judgment was properly entered as of the date of the decision, at which time the defendant was alive. This statement is entirely erroneous, and indicates that counsel may have only read the syllabus of the case and did not study the text. The fact is (read near bottom of page 483 of 108 Cal.) that while the Supreme Court found that the trial court had power to enter a *nun pro tunc* judgment it also found that such order was not proper under the circumstances of that case and *set such judgment aside* directing a judgment to be entered *payable in due course of administration,* i. e., in effect against the executrix. Such decision made necessary a finding on the question of whether or not plaintiff could maintain the action against the executrix and the court's opinion (near the bottom of page 483) on that point reads as follows:

> "The right of the plaintiff to maintain the action against the executrix of Hobart is fully authorized by section 1584 of the Code of Civil Procedure. (See also, Coleman v. Woodworth, 28 Cal. 567.) It falls within the rule given by Mansfield in Hambly v. Trott Cowp. 371: 'Where

property is acquired which benefits the testator, there an action for the value of the property shall survive against the executor.' "

We submit, therefore, that the decision in this Fox case is strictly in point; that it correctly sets forth the law of California; and that the law is that a cause of action like that at bar survives against the executor, and that this court should follow said decision.

There Is No Reason Whatever for Assuming That the Action Is Based on Contract, and There Is No Requirement in the Law That Any Claim Should Be Filed Against the Estate of Otho S. Houston Prior to the Institution of the Action.

The second contention of the opening brief of plaintiff in error is first mentioned at page 5 of said opening brief. Beginning near the bottom of page 29 thereof a little over three pages are devoted to the consideration of this second contention.

Now, we urge that this so-called second contention is purely and simply "a man of straw." It does not represent any actual contention, even plausibly in the case. The opening brief of plaintiff in error begins with the statemet, "This is an action in deceit * * *." At page 8 of said opening brief of plaintiff in error, it is again asserted, "This is an action as stated in the complaint 'for deceit' * * * it is our contention (1) that this is an action brought to recover damages for tort committed."

Now, it is also the contention of defendant in error that this is an action in deceit and is brought to recover damages for tort committed. It seems, therefore, *that both parties are contending the same thing;* and as proof that both are right in so contending it is only necessary to scan the complaint. Why then "assume that the action is based on contract" as suggested in counsel's second contention? The answer is *that both parties agree that it is not based on contract* and there is no warrant, consequently, for assuming otherwise. It is quite apparent, therefore, that the law quoted and cited by counsel under this head is not applicable. The law of California does not require a claim based upon tort to be presented to the executrix.

In Leverone v. Weakley, 155 Cal. 395, the court, near the bottom of page 401, said:

> "The claim for damages, not being one arising on a contract, was not required to be presented to the executrix prior to the bringing of suit." (Citing Hardin v. Sinclaire, 115 Cal. 460, 463.)

In Hardin v. Sinclaire, 115 Cal. 460, the second paragraph of the syllabus is as follows:

> "Only claims arising upon contract with a deceased person are required to be presented as claims against his estate, before an action can be brought thereon against his administrator, and a presentation is not required of a claim for damages for wrongful acts before the bringing of an action to recover the same against the administrator."

Near the bottom of page 463 of the authority last referred to, the court said:

> "The statute in regard to claims against estates provided that 'all claims arising upon contracts' must be properly presented and rejected before suit can be brought to recover them. (Code Civ. Proc., Secs. 1493, 1498.) This is not such a case, but an action to recover damages for wrongful acts. No presentation was therefore necessary."

Under Express Code Provisions Judgment Against the Executrix Officially for Damages Caused by the Deceit of the Testator Carries With It the Right to Judgment Against the Executrix Individually for Costs, and the Executrix Individually Has Her Recourse Against the Estate for Reimbursement.

Taking up the third mentioned contention (Opening Brief of Plaintiff in Error, p. 5), argument concerning which is found under III at page 33 of the opening brief of the plaintiff in error: Counsel has devoted but a scant page to the contention that no judgment is warranted against the executrix individually.

As we have heretofore pointed out the judgment for damages for the fraud [Tr. of Rec. p. 61] amounting to $10,060 *is not* against the defendant individually but only against her in her official capacity as executrix; and thus such judgment only reaches defendant insofar as assets came to her hands as such executrix.

Judgment for costs, however, is against her individually.

Section 1022, C. C. P., provides that costs are allowed, of course, to the plaintiff upon a judgment in his favor (among other cases) in the following:

> "3. In an action for the recovery of money or damages when plaintiff recovers $300.00 or over."

Of course, we need no argument to support allowance of costs to defendant in error, and perhaps we can consider that the question as to *allowance of costs* is not raised on this appeal. We only refer to this section in connection with section 1509, C. C. P. which reads as follows:

> "LIABILITY OF EXECUTOR, ETC., FOR COSTS. When a judgment is recovered, with costs, against any executor or administrator, he shall be individually liable for such costs, but they must be allowed him in his administration accounts, unless it appears that the suit or proceeding in which the costs were taxed was prosecuted or defended without just cause."

(See:

Stevens v. San Francisco & N. P. R. R. Co., 103 Cal. 252, 253;

Meyer O'Rourke, 150 Cal. 179;

St. Marys Hospital v. Perry, 152 Cal. 338

as to validity and interpretation of this section of the code.)

There is no bill of exceptions nor record of any kind containing any objection or exception or showing in any manner that the defedant individually or officially or in any manner whatsoever objected to the judgment or taxation of costs against her in the trial court.

In the case of Meyer v. O'Rourke, 150 Cal. 179, it was held that the estate is not an aggrieved party on an appeal by an executor as such from an award of costs against him; nor is he an aggrieved party, unless he has connected himself with the proceeding in the lower court by a motion for relief from the costs, so as to entitle him to have the constitutionality of the above section considered.

In this action it should be noted that the local rules (41-42) of the District Court for the Southern District of California provides for objections to the taxation of costs and an appeal from the decision of the clerk to the judge of the court. No such procedure nor any other similar procedure such as suggested in Meyer v. O'Rourke, *supra,* was followed. As before stated, there is no record of any objection or exception whatsoever. There is no record of any motion for a new trial—although it is clear that under the section of the code above quoted the judgment should be against the defendant individually. It is therefore submitted that there is no record permitting consideration of the third contention of plaintiff in error on this appeal, and even if there was, the judgment for costs against defendant individually is authorized and required by the terms of the code section quoted.

There Is No Evidence in the Record—No Bill of Exceptions—Which Authorizes Any Inquiry in the Merits of the Fourth Contention of the Opening Brief of Plaintiff in Error, Namely, Whether or Not the Judgment Is Excessive.

The action was to recover damages for fraud, not, as assumed by counsel in the contention under consideration, to recover merely a difference in value between property traded. The rent or the rental value of the property was one of the elements of value that defendant in error was deprived of as a result of the fraudulent devices practiced upon him by plaintiff in error's testator and was, we contend, one of the elements making up the amount of damages found by the court. The propriety of considering the rental value as an element cannot be determined without evidence upon which the finding was based. Presumably the judgment covered all items of damage to defendant in error, and the rental value was one of them.

This contention is first mentioned on page 5 of the opening brief of plaintiff in error and the little over a page of argument concerning it is found at page 34 of said opening brief.

We find ourselves in agreement with counsel in the general statement of law at page 35 of the opening brief of plaintiff in error to the effect that the measure of the recovery of damages for fraud arising out of an exchange of property is the difference in reasonable value of what the defrauded party parted with

and the reasonable value of what he received. But, as just above pointed out, there is no bill of exceptions before this court which would permit inquiry into the question of whether or not the trial court correctly applied the law. The facts to which application of the law was made must first be known, and there is no evidence in the record. Presumably, and the fact is, (if we could be permitted to so state) that what the injured party in the case at bar parted with was not only the property itself, but the income therefrom for a number of years. That is to say, but for the fraud he would have held the difference in value between the property exchanged and he would further have received the rent money accruing therefrom, all of which he was deprived by reason of fraud. We submit that in the absence of a bill of exceptions the finding must be presumed correct, and that there is nothing in the record to warrant this court in finding that the rental value was not a proper element to be considered in assessing damages.

No Other Errors in the Record.

We have now considered each of the four contentions which counsel state (Opening Brief of Plaintiff in Error, p. 4) are relied upon by plaintiff in error on this appeal. The assignments of error also said to be relied upon, quoted by counsel at page 5, *et seq.*, opening brief of plaintiff in error, are possibly broader in minute respects than counsel's four contentions. For instance, in the first specification quoted

at the bottom of page 5 of the opening brief, error is assigned generally in overruling the demurrer. This demurrer sets forth other grounds than those apparently relied upon in counsel's brief. Several of these grounds for demurrer are directed to the question of joinder of defendants individually as well as officially. We have heretofore adverted to the fact that no individual judgment was prayed against defendant and to the further circumstance that the judgment sought to be reversed is against her officially, except for costs, and as to costs the judgment is expressly authorized by the code provision.

That there is no error in the record and that the judgment should be affirmed in every respect is

Respectfully submitted,

WESTALL AND WALLACE,

ROBERT M. FULTON,

By JOSEPH F. WESTALL,

Attorneys for Defendant in Error.

No. 4038.

IN THE

United States
Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

Elizabeth Houston, as Sole Beneficiary Under the Will of Otho S. Houston, Deceased, and as Executrix of the Estate of Otho S. Houston, Deceased,

Plaintiff in Error,

vs.

J. M. Rosborough,

Defendant in Error.

PETITION FOR REHEARING.

LUCIUS K. CHASE,
Attorney for Plaintiff in Error.

Parker, Stone & Baird Co., Law Printers, 232 New High St., Los Angeles.

No. 4038.

IN THE

United States

Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

Elizabeth Houston, as Sole Beneficiary Under the Will of Otho S. Houston, Deceased, and as Executrix of the Estate of Otho S. Houston, Deceased,

Plaintiff in Error,

vs.

J. M. Rosborough,

Defendant in Error.

PETITION FOR REHEARING.

Request is respectfully made that an order for rehearing be entered herein for the reason that the court did not pass upon the question set forth on page 34 of plaintiff's in error opening brief, whether the judgment against Elizabeth Houston, as executrix, was excessive to the extent of twenty-seven hundred sixty dollars ($2760.00) thereof, the defendant in error, in an law action brought to recover damages for fraud

arising out of a trade of real estate, having recovered judgment against Elizabeth Houston not only for seven thousand dollars ($7000.00), the difference between the reasonable value of what he parted with and the reasonable value of what he received, but also the further sum of twenty-seven hundred sixty dollars ($2,760.00), which consisted of the rental value of Rosborough's demised premises from the date of the trade to the date suit was filed.

As stated in our opening brief, it was found in paragraph XIV of the findings that the difference in value between the property defendant in error traded and the value of the property he received was seven thousand dollars ($7,000.00). [Tr. p. 57.]

The court then found among the conclusions of law that Rosborough had been damaged to the extent of the difference in values between the property traded and the property received, which difference was again fixed at seven thousand dollars ($7,000.00), and had been further damaged in the further sum of twenty-seven hundred sixty dollars ($2760.00), the rental value of the property traded by him from the date of the trade to the date of filing the complaint. [Tr. p. 59.]

In our brief we discussed the doctrine and contended that in an action for damages for fraud arising out of the exchange of properties, the measure of damages is simply the difference between the reasonable value of what the defrauded party parted with and the reasonable value of what he received, citing decisions

from the Federal Courts, the Supreme Court of California, and the Supreme Court of the United States in support thereof.

The answer of counsel for defendant in error to our contention is contained in pages 27 and 28 of their brief, and their contention is that because no bill of exceptions was filed, the matter cannot be considered, admitting, however, that we are sound in our legal contentions. Counsel for defendant in error state, on page 27 of their brief:

"We find ourselves in agreement with counsel in the general statement of law at page 35 of the opening brief of plaintiff in error to the effect that the measure of the recovery of damages for fraud arising out of an exchange of property is the difference in reasonable value of what the defrauded party parted with and the reasonable value of what he received. But, as just above pointed out, there is no bill of exceptions before this court which would permit inquiry into the question of whether or not the trial court correctly applied the law."

Our answer to counsels' contention is that no bill of exceptions is necessary because the facts are entirely set forth in the findings. The facts as set forth in the findings show the value of Rosborough's property and the value of Houston's property at the time of the trade, and that the difference in value between the two is seven thousand dollars ($7000.00), and then that the rental value of the property traded by Rosborough was twenty-seven hundred sixty dollars ($2760.00), judgment having been rendered in the aggregate of both said sums.

It thus appears from the facts shown of record that judgment was rendered not only for the difference in the value of the properties traded but also for the value of the rent of the property traded by Rosborough from the date of the trade to the date of filing the complaint.

As pointed out in our answering brief, in pages one and two thereof, it is the law that where the subject matter to be reviewed appears by the record, no bill of exceptions is necessary in order to authorize the review thereof.

It has been specifically held by the Circuit Court of Appeals of the Sixth Circuit that a special finding made by the trial court becomes a part of the record, and the Appellate Court may, without a bill of exceptions, determine whether the finding is sufficient to support the judgment. (Chicago, R. I. & P. Ry. Co. v. Barrett, 190 Fed. Rep. 123.) And it is the rule of this court that whenever error is apparent from the record, it is open to revision, whether it has been made to appear by bill of exceptions or in any other manner. (Mitsui v. St. Paul Fire & Marine Ins. Co., 202 Fed. Rep. 26.)

It seems patent that the rule laid down in the Sixth Circuit, that the findings are part of the record, should be declared the rule of this circuit. If the findings are part of the record, then it appearing from the findings that an excessive judgment has been rendered, to the extent of the excess of such judgment, the judgment should be ordered reduced and a rehearing had for

that purpose. We gathered the impression upon oral argument that the court concurred in this view.

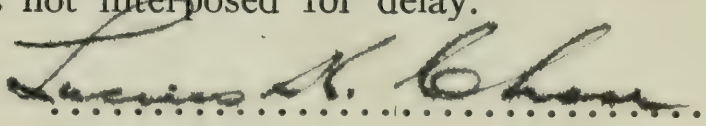
Inasmuch as the question involved was overlooked in the decision rendered by the court, we respectfully request that a rehearing be granted, and upon the rehearing that the judgment be reduced to the extent of twenty-seven hundred sixty dollars ($2760.00).

Respectfully submitted,

LUCIUS K. CHASE,

Attorney for Plaintiff in Error.

I hereby certify that I am attorney of record for the above entitled plaintiff in error, and that in my judgment the foregoing petition for rehearing is well founded, and is not interposed for delay.



No. 4039

United States
Circuit Court of Appeals
For the Ninth Circuit.

FONG YOU TUN and FONG YOU FOOK,
Appellants,

vs.

JOHN D. NAGLE, as Commissioner of Immigration for the Port of San Francisco,
Appellee.

Transcript of Record.

Upon Appeal from the Southern Division of the United States District Court for the Northern District of California, First Division.

FILED
JUN 11 1923
F. D. MONCKTON
CLERK

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

No. 4039

United States

Circuit Court of Appeals

For the Ninth Circuit.

FONG YOU TUN and FONG YOU FOOK,
Appellants,

vs.

JOHN D. NAGLE, as Commissioner of Immigration for the Port of San Francisco,
Appellee.

Transcript of Record.

Upon Appeal from the Southern Division of the United States District Court for the Northern District of California, First Division.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

	Page
Assignment of Errors	14
Certificate of Clerk U. S. District Court to Transcript on Appeal	19
Citation on Appeal	20
Demurrer to Petition for Writ of Habeas Corpus	9
Minutes of Court—April 23, 1923—Order Sustaining Demurrer, etc.	10
Names of Attorneys of Record	1
Notice of Appeal	11
Order Allowing Appeal	16
Order Sustaining Demurrer, etc.	10
Order to Show Cause	8
Petition for Appeal	12
Petition for Writ of Habeas Corpus	2
Praecipe for Transcript of Record	1
Stipulation and Order Directing the Transmission of Original Exhibits to Appellate Court	18

Names of Attorneys of Record.

For Petitioner and Appellant:
DION R. HOLM, Esq., San Francisco, Cal.

For Respondent and Appellee:
UNITED STATES ATTORNEY, San Francisco, Cal.

In the Southern Division of the United States District Court for the Northern District of California, First Division.

No. 17,789.

In the Matter of the Application of FONG YOU TUN for a Writ of Habeas Corpus for and on Behalf of His Brother, FONG YOU FOOK.

Praecipe for Transcript of Record.

To the Clerk of the Above-entitled Court:

Sir: Please issue certified copies of the following proceedings:

1. Petition for writ of habeas corpus.
2. Order to show cause.
3. Demurrer.
4. Order sustaining demurrer denying petition and discharging order to show cause.
5. Notice of appeal.
6. Petition for appeal.
7. Order allowing appeal.
8. Assignment of errors.

9. Stipulation as to exhibits and order confirming stipulation.
10. Praecipe for appeal and all minute orders of court, except those of postponement.
11. Citation on appeal, original and copy.

Dated May 8, 1923.

DION R. HOLM,
Attorney for Appellant.

[Endorsed]: Receipt of a copy of the within praecipe for transcript of record is hereby admitted this 8th day of May, 1923.

J. T. WILLIAMS,
United States District Attorney.

Filed May 8, 1923. Walter B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [1*]

In the Southern Division of the United States District Court, in and for the Northern District of California, First Division.

No. 17,789.

In the Matter of the Application of FONG YOU TUN for a Writ of Habeas Corpus for and on Behalf of His Brother, FONG YOU FOOK.

Petition for Writ of Habeas Corpus.

The petition of Fong You Tun respectfully shows:

I.

Your petitioner is a person residing at San

*Page-number appearing at foot of page of original certified Transcript of Record.

Francisco, State of California, and is the brother of Fong You Fook. Petitioner applies for a writ of habeas corpus for and on behalf of his brother, Fong You Fook, who is unable to apply by reason of his unlawful detention, imprisonment, and restraint by the United States Commissioner of Immigration at Angel Island, California.

II.

Fong You Fook is unlawfully imprisoned, detained, confined and restrained of his liberty by John D. Nagle, Commissioner of Immigration, who is the person who has the care, custody, and control of the body of the said Fong You Fook at the United States Immigration Station at Angel Island, California, in this Northern District of California, and the said Fong You Fook is to be deported therefrom to China.

III.

Fong You Fook was born in China and accompanied petitioner and another brother, named Fong You Mon, from China to the United States, Ex S. S. "China," arriving at the port of San [2] Francisco, October 12, 1922. Thereafter the Commission of Immigration directed that the testimony of petitioner, of Fong You Mon and Fong You Fook be taken down in shorthand and transcribed, as well as the testimony of all other witnesses introduced in behalf of petitioner and his brothers, to show the relationship existing between petitioner, his two brothers and their father, as well as to show the status of the father, to wit, that of a lawfully domiciled merchant. After considering the testimony introduced in behalf of the said Fong

You Fook, Fong You Mon and petitioner, the Commissioner of Immigration admitted the mercantile status of the father of petitioner and his brothers, but denied petitioner and his two brothers the right to enter the United States. From this decision an appeal was taken to the Secretary of Labor, who, on the 6th day of March, 1923, dismissed the appeals taken in behalf of Fong You Mon and Fong You Fook, and sustained the appeal taken in behalf of your petitioner, directing that petitioner be released from custody and permitted to enter the United States as the son of a lawfully domiciled merchant. Fong You Fook and Fong You Mon were ordered deported to China.

IV.

Petitioner being advised that his brother Fong You Mon had not met the burden of proof placed upon him by the laws governing the admission of Chinese into the United States, in that the said Fong You Mon failed to testify, for reasons unknown to petitioner, in accordance with the facts concerning the relationship between the said Fong You Mon and his father, petitioner does not pray for a writ of habeas corpus on behalf of the said Fong You Mon.

V.

The illegality of the imprisonment, detention, confinement and restraint of liberty of Fong You Fook consists in the following: [3]

The Commissioner of Immigration and Secretary of Labor misconstrued and failed to properly interpret, in accordance with the decisions governing the admission of Chinese into the United States and

the laws, rules and treaties concerning the immigration of Chinese to the United States, as in force and effect, concerning the burden of proof required of the said Fong You Fook.

VI.

That the hearing accorded Fong You Fook before the Commissioner of Immigration at Angel Island and the Secretary of Labor was unfair in this:

That there was no evidence introduced by the Commissioner of Immigration or the Secretary of Labor disproving the relationship existing between Fong You Fook and his father, and that the Secretary of Labor admitted petitioner to the United States on the identical testimony adduced in behalf of Fong You Fook, whom the said Secretary of Labor excluded.

VII.

Your petitioner is informed and believes that the said Secretary of Labor, through inadvertence or mistake, excluded the said Fong You Fook, and that the said Secretary of Labor, by his order of deportation intended that the said Fong You Fook and your petitioner should be landed, but that Fong You Mon, who had failed to meet the requirements as hereinabove specified, should be excluded.

VIII.

Your petitioner is informed that all of the records and testimony pertaining to the application of Fong You Fook for admission to the United States are in Washington, D. C., under the control of the Secretary of Labor. Your petitioner is without copies of the said records or testimony, and is unable to attach copies of the same to this petition,

but prays leave of [4] this Court when the said testimony and records are available, that your petitioner may affix the same to this petition, and that they be considered part of this petition, and further prays leave to amend this petition in accordance with any facts that may be discovered from the said record.

WHEREFORE your petitioner prays that a writ of habeas corpus be issued by this Honorable Court, directing and commanding John D. Nagle, Commissioner of Immigration at the Port of San Francisco, to have and produce the body of Fong You Fook before this Honorable Court at the Post Office Building, in the City and County of San Francisco, State of California, on a day, and at a time certain, to be fixed by this Court, or to show cause, if any he has, why a writ of habeas corpus should not be granted, in order that the alleged illegal cause of imprisonment and detention of the said Fong You Fook may be examined into so that if it be determined the said detention and imprisonment is unlawful and illegal and that the hearing accorded Fong You Fook was unfair, that the said Fong You Fook may be discharged and permitted to enter the United States. That a copy of this petition be served together with a copy of the order as prayed for, on the Commissioner of Immigration at Angel Island, California.

_____,

(Chinese Signature),

Petitioner.

DION R. HOLM,

Attorney for Petitioner. [5]

State of California,
City and County of San Francisco,—ss.

Fong You Tun, being first duly sworn, deposes and says: That he is the petitioner named in the foregoing petition; that he has had the same read and explained to him and that he knows the contents thereof; that the same is true of his own knowledge, except as to the matters therein alleged on his information and belief, and as to those matters, he believes them to be true.

FONG (Chinese Signature) YOU TUN.

Subscribed and sworn to before me this 12 day of March, 1923.

[Seal] THOMAS S. BURRES,
Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Filed Mar. 12, 1923. W. B. Maling, Clerk. By C. M. Taylor, Deputy Clerk. [6]

In the Southern Division of the United States District Court, in and for the Northern District of California, First Division.

No. 17,789.

In the Matter of the Application of FONG YOU TUN for a Writ of Habeas Corpus for and on Behalf of His Brother, FONG YOU FOOK.

Order to Show Cause.

GOOD CAUSE APPEARING THEREFOR, and upon reading the verified petition on file herein;

IT IS HEREBY ORDERED that John D. Nagle, United States Commissioner of Immigration at Angel Island, California, appear before this Court on the 26th day of March, 1923, at the hour of 10:00 o'clock A. M. of said day to show cause, if any he has, why a writ of habeas corpus should not be issued herein, as prayed for, and that a copy of this order, together with a copy of said petition for writ be served upon the said *Commission* of Immigration; and

IT IS FURTHER ORDERED that the said John D. Nagle, Commissioner of Immigration, aforesaid, or whoever acting under the orders of said Commissioner of the Secretary of Labor, shall have the custody of Fong You Fook, is hereby ordered and directed to retain the said Fong You Fook within the custody of the said Commissioner of Immigration, and within the jurisdiction of this Court, until further order herein.

Dated: March 12th, 1923.

R. S. BEAN,

Judge of the United States District Court.

[Endorsed]: Filed Mar. 12, 1923. W. B. Maling, Clerk. By C. M. Taylor, Deputy Clerk. [7]

In the Southern Division of the United States District Court for the Northern District of California, First Division.

No. 17,789.

In the Matter of FONG YOU FOOK, on Habeas Corpus.

Demurrer to Petition for Writ of Habeas Corpus.

Comes now the respondent, John D. Nagle, Commissioner of Immigration, at the port of San Francisco, in the Southern Division of the Northern District of California, and demurs to the petition for a writ of habeas corpus in the above-entitled cause and for grounds of demurrer alleges:

I.

That the said petition does not state facts sufficient to entitle petitioner to the issuance of a writ of habeas corpus, or for any relief thereon.

II.

That said petition is insufficient in that the statements therein relative to the record of the testimony taken on the trial of the said applicant are conclusions of law and not statements of the ultimate facts.

WHEREFORE, respondent prays that the writ of habeas corpus be denied.

JOHN T. WILLIAMS,
United States Attorney,

_____,
Asst. United States Attorney,
Attorneys for Respondent.

[Endorsed]: Filed Apr. 23, 1923. Walter B. Maling, Clerk. By Lyle S. Morris, Deputy Clerk. [8]

At a stated term of the Southern Division of the United States District Court for the Northern District of California, First Division, held at the courtroom thereof, in the City and County of San Francisco, on Monday, the 23d day of April, in the year of our Lord, one thousand nine hundred and twenty-three—Present: The Honorable JOHN S. PARTRIDGE, District Judge.

No. 17,789.

In the Matter of FONG YOU WOOK, on Habeas Corpus.

Minutes of Court—April 23, 1923—Order Sustaining Demurrer, etc.

This matter came on regularly for hearing on order to show cause as to the issuance of a writ of habeas corpus herein. D. R. Holm, Esq., was present as attorney for petitioner and detained. P. A. Robbins, Esq., was present as attorney for respondent, and filed demurrer to petition, and all parties consenting thereto, it is ordered that the Immigration Records be filed as Respondent's Exhibits "A," "B," "C" and "D" and that the same be considered as part of original petition. After argument by the respective attorneys, the Court ordered that said matter be and the same is hereby submitted and, after due consideration

had thereon, further ordered that said demurrer be and the same is hereby sustained and said petition for writ of habeas corpus denied. [9]

In the Southern Division of the United States District Court for the Northern District of California, First Division.

No. 17,789.

In the Matter of the Application of FONG YOU TUN for a Writ of Habeas Corpus for and on Behalf of His Brother, FONG YOU FOOK.

Notice of Appeal.

To the Clerk of the Above-entitled Court and the Honorable JOHN T. WILLIAMS, United States Attorney for the Northern District of California:

YOU AND EACH OF YOU will please take notice that Fong You Fook, the detained herein, by Fong You Tun, his brother, the petitioner herein, do hereby appeal to the Circuit Court of Appeals of the United States for the Ninth Circuit from the order made and entered herein on the 23d day of April, 1923, sustaining the demurrer, discharging the order to show cause, and denying the petition for a writ of habeas corpus filed herein.

Dated: San Francisco, Calif., May 8, 1923.

DION R. HOLM,

Attorney for Petitioner and Detained, Appellants Herein.

Receipt of a copy of the within notice of appeal is hereby admitted this 8th day of May, 1923.

J. T. WILLIAMS,
United States District Attorney.

[Endorsed]: Filed May 8, 1923. Walter B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [10]

In the Southern Division of the United States District Court for the Northern District of California, First Division.

No. 17,789.

In the Matter of the Application of FONG YOU TUN for a Writ of Habeas Corpus for and on Behalf of His Brother, FONG YOU FOOK.

Petition for Appeal

Comes now Fong You Fook, the detained, by Fong You Tun, the petitioner, who are the appellants herein, and alleges that:

I.

On the 23d day of April, 1923, the above-entitled Court made and entered its order denying the petition for a writ of habeas corpus as prayed for and filed herein, sustaining a demurrer to the said petition, and discharging an order to show cause, in which said order of Court certain errors are made to the prejudice of the appellants, all of which will more fully appear from the assignment of errors filed herein.

WHEREFORE these appellants pray that an appeal may be granted in their behalf to the Circuit Court of Appeals of the United States for the Ninth Circuit, for the correction of the errors so complained of, and further that the transcript of the record, proceedings and papers in the above-entitled cause, as shown by the praecipe may be sent and transmitted to the Circuit Court of Appeals for the Ninth Circuit, under the rule of the said Court in accordance with the law in such case, made and provided, and that all further proceedings in this matter be stayed until the final determination of said appeal.

DION R. HOLM,

Attorney for Petitioner, Detained and Appellants.

[11]

Receipt of a copy of the within petition for appeal is hereby admitted this 8th day of May, 1923.

J. T. WLLIAMS,

United States District Attorney.

[Endorsed]: Filed May 8, 1923. Walter B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk.

[12]

In the Southern Division of the United States District Court for the Northern District of California, First Division.

No. 17,789.

In the Matter of the Application of FONG YOU TUN for a Writ of Habeas Corpus for and on Behalf of His Brother, FONG YOU FOOK.

Assignment of Errors.

Now comes Fong You Fook, the detained herein, by Fong You Tun, his brother, the petitioner herein, both of whom are appellants herein, by their attorney, Dion R. Holm, and file the following assignment of errors upon which they will rely in the prosecution of their appeal in the above-entitled cause in the United States Circuit Court of Appeals for the Ninth Circuit from the order and judgment made by this Honorable Court on the 23d day of April, A. D. 1923:

I.

The Court erred in denying the petition for a writ of habeas corpus.

II.

The Court erred in sustaining the demurrer to the petition for a writ of habeas corpus.

III.

The Court erred in discharging the order to show cause why a writ of habeas corpus should not issue.

IV.

The Court erred in holding the Commissioner of Immigration and Secretary of Labor properly construed and interpreted the decisions and the laws, rules and treaties concerning the admission of Chinese into the United States, in [13] respect to the burden of proof required of the said Fong You Fook.

V.

The Court erred in holding the Commissioner of Immigration and Secretary of Labor accorded Fong You Fook a fair hearing and did not exclude him without due process of law when the said Fong You Fook was denied permission to enter the United States on the same testimony that Fong You Tun, a brother of the said Fong You Fook was permitted to enter the United States.

VI.

The Court erred in finding the Secretary of Labor did not, through inadvertence or mistake, exclude the said Fong You Fook.

WHEREFORE, because of the manifest errors permitted by the said Court, the appellants, through their attorney, pray the said judgment sustaining the demurrer to the petition for a writ of habeas corpus, discharging the order to show cause, and denying the writ of habeas corpus be reversed, and for such other and further relief as the Court may deem meet and proper.

Dated: May 8, 1923.

DION R. HOLM,
Attorney for Appellants.

Receipt of a copy of the within assignment of errors is hereby admitted this 8th day of May, 1923.

J. T. WILLIAMS,
United States District Attorney.

[Endorsed]: Filed May 8, 1923. Walter B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [14]

In the Southern Division of the United States District Court for the Northern District of California, First Division.

No. 17,789.

In the Matter of the Application of FONG YOU TUN for a Writ of Habeas Corpus for and on Behalf of His Brother, FONG YOU FOOK.

Order Allowing Appeal.

On motion of Dion R. Holm, attorney for Fong You Tun, the brother and petitioner in the above-entitled cause, and for Fong You Fook, the applicant,—

IT IS HEREBY ORDERED that an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, from an order and judgment heretofore made and entered herein, sustaining the demurrer to the petition for a writ of habeas corpus, discharging the order to show cause, and denying the petition for a writ of habeas corpus

be, and the same is, hereby allowed, and that a certified transcript of the record, testimony, exhibits, stipulations and all proceedings be forthwith transmitted to the United States Circuit Court of Appeals for the Ninth Circuit in the manner and time prescribed by law, and that meanwhile all further proceedings in this court and by the United States immigration authorities be suspended, stayed and superseded until the determination of this appeal, and that the said Fong You Fook be retained within the custody of this court and in this district until the said appeal has been determined.

Dated: May 8, 1923,

JOHN S. PARTRIDGE,

Judge of the District Court of the United States.

[15]

Receipt of a copy of the within order allowing appeal is hereby admitted this 8th day of May, 1923.

J. T. WILLIAMS,

United States District Attorney.

[Endorsed]: Filed May 8, 1923. Walter B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [16]

In the Southern Division of the United States District Court in and for the Northern District of California, First Division.

No. 17,789.

In the Matter of the Application of FONG YOU TUN for a Writ of Habeas Corpus for and on Behalf of His Brother FONG YOU FOOK.

Stipulation and Order Directing the Transmission of Original Exhibits to Appellate Court.

IT IS HEREBY STIPULATED AND AGREED by and between the respective parties in the above-entitled cause that the original records of the United States Bureau of Immigration which were filed in the above-entitled court as respondent's exhibits may be transferred in their original form and without being transcribed to the United States Circuit Court of Appeals for the Ninth Circuit and the same is and may there be considered part of the record in determining this cause on appeal to the said United States Circuit Court of Appeals for the Ninth Circuit without objection on the part of either of said respective parties;

AND IT IS FURTHER STIPULATED the appeal taken in this matter may be placed on the current calendar of the said United States Circuit Court of Appeals and considered as submitted as of June 5, 1923.

Dated May 3, 1923.

JOHN T. WILLIAMS,
United States District Attorney.
ALMA M. MEYERS,
Asst. United States District Attorney.
DION R. HOLM,
Attorney for Appellants.

IT IS HEREBY ORDERED that the terms of the above stipulation be complied with.

JOHN S. PARTRIDGE,
Judge of the United States District Court. [17]

Receipt of a copy of the within —— is hereby admitted this 8th day of May, 1923.

J. T. WILLIAMS,
U. S. Atty.,
Attorney for Respondents.

[Endorsed]: Filed May 11, 1923. Walter B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [18]

Certificate of Clerk U. S. District Court to Transcript on Appeal.

I, Walter B. Maling, Clerk of the United States District Court, for the Northern District of California, do hereby certify that the foregoing 18 pages, numbered from 1 to 18, inclusive, contain a full, true and correct transcript of certain records and proceedings, in the matter of Fong You Fook, on habeas corpus, No. 17,789, as the same now remain on file and of record in this office; said transcript having been prepared pursuant to and

in accordance with the praecipe for transcript on appeal (copy of which is embodied herein) and the instructions of the attorney for appellant herein.

I further certify that the cost for preparing and certifying the foregoing transcript on appeal is the sum of six dollars and eighty-five cents ($6.85), and that the same has been paid to me by the attorney for appellant herein.

Annexed hereto is the original citation on appeal issued herein (page 20).

IN WITNESS WHEREOF I have hereunto set my hand and affixed the seal of said District Court this 24th day of May, A. D. 1923.

[Seal] WALTER B. MALING,
Clerk.
By C. M. Taylor,
Deputy Clerk. [19]

Citation on Appeal.

UNITED STATES OF AMERICA,—ss.

The President of the United States, to JOHN D. NAGLE, Commissioner of Immigration for the Port of San Francisco, and to JOHN T. WILLIAMS, Esq., United States District Attorney, GREETING:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the City of San Francisco, in the State of California,

within thirty days from the date hereof, pursuant to an order allowing an appeal, of record in the Clerk's Office of the United States District Court for the Northern District of California, Southern Division, wherein Fong You Tun and Fong You Fook are appellants and you are appellee, to show cause, if any there be, why the decree rendered against the said appellants, as in the said order allowing appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable JOHN S. PARTRIDGE, United States District Judge for the Northern District of California, this 21st day of May, A. D. 1923.

JOHN S. PARTRIDGE,
United States District Judge.

[Endorsed]: No. 17,789. United States District Court for the Northern District of California. Fong You Tun and Fong You Fook, Appellants, vs. John D. Nagle, Commissioner of Immigration. Citation on Appeal. Filed May 22, 1923. Walter B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk.

Service of the within citation by copy admitted this 22d day of May, 1923.

JOHN T. WILLIAMS,
ALMA M. MEYERS,
Attorneys for Appellee. [20]

[Endorsed]: No. 4039. United States Circuit Court of Appeals for the Ninth Circuit. Fong You Tun and Fong You Fook, Appellants, vs. John D. Nagle, as Commissioner of Immigration for the Port of San Francisco, Appellee. Transcript of Record. Upon Appeal from the Southern Division of the United States District Court for the Northern District of California, First Division.

Filed May 24, 1923.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

No. 4039

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

FONG YOU TUN and FONG YOU FOOK,
Appellants,

vs.

JOHN D. NAGLE, as Commissioner of Immigration for the Port of San Francisco,
Appellee.

BRIEF FOR APPELLANTS.

DION R. HOLM,
Attorney for Appellants.

FILED
SEP 15 1913

PERNAU-WALSH PRINTING CO., SAN FRANCISCO

No. 4039

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

FONG YOU TUN and FONG YOU FOOK,
Appellants,

vs.

JOHN D. NAGLE, as Commissioner of Immigration for the Port of San Francisco,
Appellee.

BRIEF FOR APPELLANTS.

Statement of Facts.

Fong Foo, a person of Chinese descent, first came to the United States in 1887. He made a trip to China November 26, 1907, returning to the United States January 22, 1910. On arriving in 1910 Fong Foo gave the details as to his family in China to the immigration authorities, saying he had three sons, Fong You Sam, 18 years old, who was an adopted son, and with whom we are not concerned, Fong You Fook, two years old, the son about whom these proceedings revolve, and Fong You Mon, one year old. A third son was born to the wife of Fong Foo a few months after the latter had left

China for the United States, named Fong You Tun, one of the appellants herein.

On October 12, 1922, Fong You Tun, Fong You Mon, and Fong You Fook, as of that date aged respectively 12, 13 and 14 years, applied at the Port of San Francisco for admission into the United States as sons of the merchant, Fong Foo.

The testimony of the father, the three boys, and a person named Mar Kim was taken before an Immigration Inspector. On December 4, 1922, the Commissioner of Immigration at Angel Island denied the three boys the right to enter the United States on the ground the relationship between them and Fong Foo, the father, was not established to the Commissioner's satisfaction. The usual ten days were allowed to produce any other evidence tending to prove the relationship.

Fong Cheow, an additional witness, was produced. His testimony was taken and the father and the boys were re-examined. Thereafter, on January 17, 1923, the Commissioner of Immigration again denied to all three of the boys the right to enter and an appeal was perfected to the Secretary of Labor on January 20, 1923.

The decision of the Commissioner excluding all three of the boys was affirmed by the Secretary of Labor on March 5, 1923, but on March 8, 1923, the Secretary of Labor reversed his decision as to Fong You Tun, the youngest of the brothers, and ordered Fong You Mon and Fong You Fook deported.

A petition for writ of habeas corpus was applied for on behalf of Fong You Fook. The matter was argued before the District Court, and on April 23, 1923, a demurrer to the writ was sustained. From this judgment an appeal to this Honorable Court was perfected.

There was no application for a writ made in behalf of Fong You Mon who was, in accordance with the Secretary of Labor's decision, deported to China. The reason for not applying for a writ in behalf of Fong You Mon will appear in the argument in this case.

It was stipulated (T. R. pages 18 and 19) between the attorneys for the appellee and appellants that the original records of the United States Bureau of Immigration, which were filed as Appellee's Exhibits in the District Court, might be transferred in their original form to this Court and considered part of the record. Reference to these exhibits will be made in the argument giving the exhibit cited an initial and page number.

ARGUMENT.

I.

THE HEARINGS ACCORDED FONG YOU FOOK WERE UNFAIR AS THE SECRETARY OF LABOR ADMITTED FONG YOU TUN ON THE SAME EVIDENCE HE EXCLUDED FONG YOU FOOK.

The foregoing constitutes the only point involved in this case.

The evidence consists solely of the testimony of the three boys, the father and the two identifying witnesses. The only basis upon which a decision denying Fong You Fook the right to enter this country could successfully be based, would be upon discrepancies developed from the testimony of the witnesses.

The father's status as a merchant is conceded and the discrepancies must be limited to the questions and answers pertaining to relationship, which is the basis of the decision adverse to Fong You Fook.

The records before the Commissioner of Immigration and the Secretary of Labor, and which are before this Court, consist of Appellee's Exhibits initialed A, B, C, and D. Exhibit A is the only one material to this case.

At pages 41-43, Exhibit A, Immigration Inspector Moore who first heard the case, pointed out discrepancies supposed to have been developed out of statements made by Fong You Fook. Inspector Mayerson, at pages 45, 67 and 69 of Exhibit A, approved of the discrepancies pointed out by Inspector Moore.

The Board of Review at Washington and the Secretary of Labor found Inspectors Moore and Mayerson were in error and the discrepancies actually resulted from misstatement of facts by Fong You Mon, the brother, who was deported to China.

The Secretary of Labor, at page 101, Exhibit A, approved of the following finding of the Board of Review:

> "A review of the testimony shows that the alleged father and applicants Fong You Fook and Fong You Tun are in *substantial agreement on the points regarding which they were questioned,* the discrepancies resulting from a comparison of their statements and those of Fong You Mon. From this circumstance, counsel draws the conclusion that the cases of Fong You Fook and Fong You Tun are established, while they apparently feel that there is some doubt as to Fong You Mon. The Board of Review, however, does not believe it is justified in accepting as true with respect to two of the applicants testimony which it thinks is clearly discredited by discrepancies developed when their statements are compared with those of the third. It regards the discrepancies as material, and as affecting the whole case. * * *"

It is conceded the record contains discrepancies, but the discrepancies and conflicts in the testimony are not from the result of the testimony given by the identifying witnesses, the father, Fong You Tun, or Fong You Fook, but solely by misstatement of facts by Fong You Mon.

It is obvious from the record that Fong You Mon failed, even for a boy of thirteen (13) years, to meet the difficult burden of proof placed on him by the Immigration laws, of establishing his right to enter this country. He was deported to China. No effort was made to resort to the courts to prevent his deportation.

By reading the testimony given by Fong You Mon it appears that he must have been in a highly nervous frame of mind and frightened while giving his testimony, as he failed to answer many simple questions.

It is not contended the inspectors conducting the examinations were unfair in their treatment of Fong You Mon as it was recognized the fault rested with him in not stating the facts as he knew them.

The record in this case fails to disclose where the testimony of either Fong You Fook or Fong You Tun was in conflict, save in insignificant details, with that of their father or the two identifying witnesses. This statement is substantiated by the excerpt from the finding of the Board of Review, above quoted, and which was made on March 5, 1923, and approved by the Secretary of Labor the same day. While it was held in the findings last referred to, that the father, Fong You Fook and Fong You Tun "are in substantial agreement on the points regarding which they were questioned", yet the Board of Review and the Secretary of Labor recommended and ordered all three boys deported.

The decision may have been reached on the theory the erroneous testimony of Fong You Mon discredited the evidence of Fong You Tun, Fong You Fook, Fong Foo and the two identifying witnesses, or it may have been based on that portion of the

decision at page 101 of Exhibit "A", reading as follows:

> "But, if the mother is now sixty years of age, and therefore, about forty-nine in 1910 and forty-seven when the first applicant was born, at which time the alleged father was about forty-eight years of age, it is deemed improbable that persons of their ages would become the parents of three normal children in less than three years."

On March 8, 1923, the same Board of Review and the same Secretary of Labor reversed their ruling as to Fong You Tun. The following excerpt from their findings of March 8, 1923, is to be found at page 105, Exhibit A:

Refers to Report of March 5, 1923, and then says:

> "The Board of Review, after again going over this file is inclined to believe that the relationship, so far as Fong You Tun is concerned, may be regarded as reasonably established. He is only twelve years of age, and a review of his testimony shows that he has made a satisfactory and willing witness and has testified in an apparently frank manner. His statements, in all material respects, are in agreement with those of his alleged father. *They disagree with those of one of his alleged brothers, Fong You Mon, in some essential particulars,* but it is believed that these disagreements, so far as he is concerned, may be overlooked, in view of the features already set forth and the fact that there is a striking and convincing resemblance between him and his alleged father. The resemblance is regarded as very significant and as indicating a proba-

> bility that this applicant is the son of Fong Foo.
>
> "It is recommended that the previous decision be reversed, so far as Fong You Tun is concerned, and his appeal be sustained."

From the foregoing we find the Board of Review and the Secretary of Labor abandoned the theories of exclusion as set forth in their findings of March 5, as on March 8, 1923, they found Fong Foo and his wife, despite their age in 1910, could have a normal child born who is now twelve (12) years old, and the discrepancies of testimony occasioned by comparing the evidence of the third brother, Fong You Mon, did not discredit the testimony of the other two brothers.

On March 8, 1923, the youngest son, Fong You Tun was ordered landed. The only difference between the cases of the brothers Tun and Fook is the Secretary of Labor held the photograph of Tun resembled that of his father.

It is to be noted, by inadvertence, a picture of Fong You Mon was not in the record presented to the Department at Washington. Exhibit A, pages 2, 80 and 87, contain the photographs. At page 87 the Immigration Inspector solemnly initials the picture of Fong You Tun as that of Fong You Mon, and as a matter of fact it was a picture of Fong You Tun.

In answer to the finding that the picture of Fong You Tun resembled that of the father's being a

sufficient ground to differentiate Tun's case from Fook's, it is sufficient to say the Chinese Exclusion Act does not contain any provision requiring an applicant to look like his parents, was never so construed, and would be absurd and unlawful to demand such a requirement of an applicant for admission.

The authorities determining what constitutes a fair and what an unfair hearing by the Immigration Authorities, have so frequently been brought to this Court's attention a mere reference to the citations will be made.

> Rule 9, Sub. 1—Rules Governing The Admission of Chinese—U. S. Dept. Labor, applying the decision in
> 176 U. S. 459
> (holding Chinese of the Exempt class entitled to bring to the United States their children). Sub. 2 of Rule 9 provides "there shall be exacted convincing proof of the relationship."

Fong Foo is of the exempt class and the evidence introduced in behalf of Fong Fook was determined by the Secretary of Labor to be in substantial agreement on the points regarding which he was questioned with all the other witnesses introduced, except Fong You Mon; (and by admitting Fong Tun showed this was unnecessary) we contend met the burden of proof imposed on him.

No evidence was introduced to disprove the relationship between Fong Foo and Fong You Fook. The following cases hold there must be some sup-

porting evidence to sustain an adverse decision to an applicant.

Whitefield v. Hanges, 222 Fed. 745;
U. S. v. Fong On, 240 Fed. 234;
Aug Chew Lung v. Burnett, 232 Fed. 853;
Chan Kan v. U. S., 232 Fed. 855.

Disregarding evidence of a conclusive character is an abuse of discretion and constitutes an unfair hearing.

Tang Tun v. Edsell, 223 U. S. 673;
Low Wah Suey v. Backus, 225 U. S. 460;
Zakonite v. Wolf, 226 U. S. 272.

It is respectfully contended that the hearings accorded Fong You Fook were unfair as there was no evidence introduced to disprove his claim, and the Secretary of Labor admitted Fong You Tun on the identical evidence he excluded Fong You Fook.

Dated, San Francisco,
September 15, 1923.

Respectfully submitted,
Dion R. Holm,
Attorney for Appellants.

No. 4039

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

FONG YOU TUN and FONG YOU FOOK,
Appellants,

vs.

JOHN D. NAGLE, as Commissioner of Immigration for the Port of San Francisco,
Appellee.

BRIEF FOR APPELLEE

JOHN T. WILLIAMS,
United States Attorney,

ALMA M. MYERS,
Asst. United States Attorney,
Attorneys for Appellee.

Neal, Stratford & Kerr, S. F. 35178

No. 4039

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

FONG YOU TUN and FONG YOU FOOK,
Appellants,

vs.

JOHN D. NAGLE, as Commissioner of Immigration for the Port of San Francisco.
Appellee,

BRIEF FOR APPELLEE

STATEMENT OF FACTS.

The facts in this case are that on November 26, 1907, Fong Foo, the alleged father of applicant Fong You Fook, left this country on a visit to China, returning to the United States on January 22, 1910. It thus appears he was in China at the most for a period of two years. The claim is made that two of the three boys who sought admission as his sons were born while he was in China and the third shortly after his return. All three are alleged to be full

brothers born of a mother past 47 years of age at the time of the birth of the eldest of the three. The youngest of the three boys was landed, the eldest was excluded and deported, the third applied to the Court to obtain admission and is appealing from the decision of the District Court upholding the excluding decision of the Immigration authorities. The claim made is that he was denied admission on the same evidence upon which the youngest was admitted.

The fact is that the testimony of the alleged father, the applicant and Fong You Tun, the landed son, is to the effect that the paternal grandmother, whose name is said to be Ng Shee, of the age of 80 years, is alive and residing in the house in China from which the boys have just come. Further they state that the village from which they came is said to have only two houses, one occupied by themselves and the other by one Fong Sue Ngee whose wife is said to have died last year. Fong You Mun, the one excluded and deported, states that the paternal grandparents are dead and that he has never seen his paternal grandmother, and that he never saw the wife of Fong Sue Ngee. These two conflicting statements in the testimony of the alleged sons are merely two instances of discrepancies in the record concerning matters about which they could not be presumed to be mistaken.

The cases of Fong You Fook, Fong You Mun and Fong You Tun were regularly heard and decided by

the Immigration authorities at the port of San Francisco and from the adverse findings of the port officers appeal was taken to the Secretary of Labor. The Secretary on first consideration of the evidence sustained the findings of the port officers and ordered the three applicants excluded. Three days later, the Secretary amended his decision and ordered the admission of Fong You Tun, the youngest of the applicants, and ordered the exclusion of the other two. It is conceded by counsel that the exclusion of applicant Fong You Mun was entirely proper, it appearing that there were material discrepancies between his testimony and that of his alleged brothers and alleged father. Counsel contends that the hearings accorded Fong You Fook were unfair for the reason that no evidence was introduced to disprove his claim and secondly that the Secretary admitted Fong You Tun on the *identical evidence* on which he excluded Fong You Fook. The question therefore is, did the Immigration authorities deny the admission of Fong You Fook on the identical evidence on which they admitted Fong You Tun?

ARGUMENT.

The hearings before the Immigration officials were fair and the findings thereon are supported by the evidence.

Manifestly the decision of the Secretary was unfair, if as counsel contends, it was predicated on the same and identical evidence in each case, and it is

on this contention that the case must stand or fall. It is pertinent then to examine the record to determine why the Secretary, after first entering a finding, excluding Fong You Tun, later rendered a finding granting him admission. The Secretary's reasons are set forth in report of March 5, 1923 (Ex. A), reading as follows:

> "The Board of Review, after again going over his file is inclined to believe that the relationship, so far as Fong You Tun is concerned, may be regarded as reasonably established. He is only twelve years of age, and a review of his testimony shows that he has made a satisfactory and willing witness and has testified in an apparently frank manner. His statements, in all material respects, are in agreement with those of his alleged father. They disagree with those of one of his alleged brothers, Fong You Mon, in some essential particulars, but it is believed that these disagreements, *so far as he is concerned, may be overlooked,* in view of the features already set forth and the fact that there is a striking and convincing resemblance between him and his alleged father. *The resemblance is regarded as very significant and as indicating a probability that this applicant is the son of Fong Foo.*"

In the determination of relationship physical comparisons between persons claiming kinship is competent and material evidence.

His Honor, Judge Dietrich, in the case of *Ex Parte Choocy Dee Ying,* 214 Fed. 873, said:

"It cannot be doubted that such comparison is competent and may disclose most convincing evidence of kinship, especially where the relationship is that of father and son."

Numerous cases in point have been before the State Courts, as follows:

State vs. Woodruff, 67 N. C. 89-92

Gaunt vs. State, 50 N. Y. Law. 490

Jones vs. Jones, 45 Md. 144 (152)

State vs. Saidell, 70 N. H. 174, 176

State vs. Danforth, 73 N. H. 215

State vs. Smith, 54 Iowa, 104, 105

Finnegan v. Dugan, 14 Allen, 96 Mass. 197

In Re Jessup, 81 Cal. 408-418

Kelly v. State, 133 Ala. 195-198

Gilmanton v. Ham, 38 N. H. 108-113

Douglass Peerage case, 2 Harger Collect Jurid 402

2 *Wigmore on Evidence,* 1150-1154, and

Ex parte Chooey Dee Ying, 214 Fed. 873,

from which the following language is quoted:

"Physical comparison between applicant and father is competent and material evidence."

Thus it is disclosed by the Court that the Secretary did have before him evidence in the case of Fong You Tun sufficient in his opinion, to turn the scale in favor of his admission. No such evidence existed in favor of appellant herein.

The record discloses that fabricated testimony had been introduced which put the whole case of the parties on whose behalf it was offered under suspicion and which caused the Secretary to reject the testimony offered to establish the claimed relationship. In Soo Hoo Doo Hon vs. Johnson, 281 Fed. 870, the Court said:

> "Proof that fabricated testimony has been introduced does much more than merely discredit the witness involved; it puts the whole case of the party on whose behalf it was offered under suspicion. In this instance the immigration tribunals were quite within their rights in rejecting the testimony of both the applicant and his alleged father, and it does not seem to me that under the circumstances disclosed they acted arbitrarily and unfairly in refusing to accept the testimony of the other witnesses as establishing the applicant's parentage as claimed by him."

Also the following language found in the case entitled Wong Foo and Wong Ding, Dist. Court No. 15984 is pertinent here:

> "If an alien, domiciled here, attempt to perpetrate a fraud upon the Government, he is not in a position to complain, if later claims by him supported chiefly by his own statements and that of another who participated in the fraud, are rejected. Counsel calls this penalizing him. But while it may have that effect such effect is incidental. The real fact is that his statements and the statements of such other are so discred-

> ited that reliance cannot be placed therein. Any other rule, except that based upon the good faith of the domiciled alien and the sons that he brings into the country would place a premium on perjury."

Notwithstanding the fact that the Immigration authorities were convinced that the case of Fong You Mun was fraudulent and that the others claiming to be members of the same family were parties to the fraud, and that suspicion and doubt as to the existence of the claimed relationship of Fong You Fook and Fong You Tun immediately arose, notwithstanding this, however, an examination and comparison of the photographs of Fong You Tun and of his alleged father Fong Fook brought to the Secretary the conviction that the two were nevertheless father and son, and thus the finding that "the disagreements, so far as this applicant is concerned, will be overlooked in view of the striking and convincing resemblance existing between them." Whether the Secretary was right or wrong in reaching this conclusion is immaterial.

This Court speaking through his Honor Judge Morrow, in *White vs. Gregory,* 213 Fed. 768, says:

> "In reaching this conclusion the officers gave the aliens the hearing provided by the statute. This is as far as the Court can go in examining such proceedings. It will not inquire into the sufficiency of probative facts, or consider the reasons for the conclusions reached by the officers."

Because of the character of the evidence and the contradictions and discrepancies therein the Secretary of Labor was called upon to exercise his discretion in a determination of the matter before him.

> "The exercise of an honest judgment, however erroneous it may appear to be, is not an abuse of discretion. Abuse of discretion and especially gross and palpable abuse of discretion, which terms are ordinarily employed to justify an interference with the exercise of discretionary power, implies not merely error of judgment, but perversity of will, passion, prejudice, partiality or moral delinquency. 29 N. Y. 418, 431." 1 C. J. 372.

It appears from the record that the Secretary took pains to do these applicants full justice for after his decision had been rendered, the record was again gone over and it was then discovered that the applicant Fong You Tun bore a strong resemblance to his alleged father. It appears, however, that his review of the record did not lead him to reverse his finding as to the other two applicants.

The remarks in *Chin Yow vs. United States,* 208 U. S. 8, 11, are in point to meet the contention of counsel that no evidence was introduced to disprove Fong You Fook's claim. It is there said:

> "It must not be supposed that the mere allegation of the facts opens the merits of the case, whether those facts are proved or not. And by

way of caution, we may add that jurisdiction would not be established simply by proving that the commissioner and the Department of Commerce and Labor did not accept certain sworn statements as true, even though no contrary or impeaching testimony was adduced."

In the exercise of his discretion the Secretary decided the case in favor of one and against the other two applicants. There being evidence to support the findings, his decision is not subject to judicial review under the well settled rule that courts cannot review an order of the Immigration authorities excluding a Chinese person where there is any evidence to support the decision.

Ex Parte Ng Kwack Kang, 233 Fed 478

Frick vs. Lewis, 195 Fed. 693

Ex Parte Kusuki Sata, 215 Fed. 173

U. S. vs. Howe, 235 Fed. 990

Ex Parte Chin Doe Tung, 236 Fed. 1017

Lam Fung You vs. Frick, 233 Fed. 393

It is contended that the Secretary of Labor in the present case acted within the scope of the discretionary powers committed to him. Such being the case his order, within the authority of the statute, is final.

It is therefore respectfully submitted that the hearings accorded Fong You Fook were regular and fair in all respects, and that the decision of the Secre-

tary of Labor excluding him from admission to the United States is supported by the evidence.

Dated: San Francisco, California,
October 31, 1923.

Respectfully submitted,

JOHN T. WILLIAMS,
United States Attorney,

ALMA M. MYERS,
Asst. United States Attorney,
Attorneys for Appellee.

No. 4040

United States

Circuit Court of Appeals

For the Ninth Circuit.

T. M. CALDWELL,

Appellant,

vs.

ALBERT STEINFELD, BETTINA STEINFELD, FIDELITY SAVINGS & LOAN ASSOCIATION, a Corporation, and PIMA FARMS COMPANY, a Corporation, et al.,

Appellees.

Transcript of Record.

Upon Appeal from the United States District Court for the District of Arizona.

FILED
JUN 13 1923
F. D. MONCKTON,
CLERK

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

No. 4040

United States

Circuit Court of Appeals

For the Ninth Circuit.

T. M. CALDWELL,

Appellant,

vs.

ALBERT STEINFELD, BETTINA STEINFELD, FIDELITY SAVINGS & LOAN ASSOCIATION, a Corporation, and PIMA FARMS COMPANY, a Corporation, et al.,

Appellees.

Transcript of Record.

Upon Appeal from the United States District Court for the District of Arizona.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

	Page
Assignments of Error on Appeal	25
Bond on Appeal	29
Certificate of Clerk U. S. District Court to Transcript of Record	35
Citation on Appeal (Copy)	27
Citation on Appeal (Original)	33
Decision and Order Sustaining Motions to Dismiss	20
Decree Dismissing Second Amended Complaint as Against Albert Steinfeld, Bettina Steinfeld, Fidelity Savings & Loan Association and Pima Farms Company	19
Motion to Dismiss (Albert Steinfeld and Bettina V. Steinfeld)	16
Motion to Dismiss (Fidelity Savings & Loan Association)	18
Motion to Dismiss (Pima Farms Company)	17
Names and Addresses of Attorneys of Record.	1
Opinion and Order Sustaining Motions to Dismiss	20
Order Allowing Appeal and Fixing Bond	24
Petition for Appeal to the United States Circuit Court of Appeals for the Ninth Circuit	23
Praecipe for Transcript of Record	31
Second Amended Complaint	2

Names and Addresses of Attorneys of Record.

Messrs. ARMSTRONG, LEWIS & KRAMER, Phoenix, Arizona, JAMES R. MOORE, Esquire, Phoenix, Arizona,
Solicitors for Appellant.

Messrs. KINGAN, CAMPBELL & CONNER, Tucson, Arizona,
Solicitors for Appellees.

In the District Court of the United States in and for the District of Arizona.

TUCSON—EQUITY No. E—94.

ANCILLARY No. 3.

T. M. CALDWELL,

Plaintiff,

vs.

EDWIN R. POST, Doing Business Under the Firm Name and Style of EDWIN R. POST COMPANY; EDNA S. POST, Wife of EDWIN R. POST; VALLEY FARMS WATER COMPANY, a Corporation; MOSE DRACHMAN, as Receiver of the Property and Effects of EDWIN R. POST, and VALLEY FARMS WATER COMPANY, a Corporation; ALBERT STEINFELD, BETTINA V. STEINFELD, Wife of ALBERT STEINFELD; FIDELITY SAVINGS & LOAN ASSOCIATION, a Corporation; and PIMA FARMS COMPANY, a Corporation,

Defendants.

Second Amended Complaint.

The plaintiff T. M. Caldwell, by his solicitors Armstrong, Lewis & Kramer and James R. Moore, by leave of Court first had and obtained, files this, his second amended complaint, and for cause of action against the defendants and each of them, alleges:

I.

That at all times herein mentioned Edwin R. Post was doing business under the firm name and style of Edwin R. Post Company; that the Valley Farms Water Company is an Arizona corporation, having its principal office and place of business in the City of Tucson, State of Arizona; that Albert Steinfeld and Mose Drachman were by this Honorable Court, in that certain cause now pending therein, entitled "Western Machinery Company, a corporation, and Reuben R. Schweitzer, plaintiffs, vs. Edwin R. Post and Valley Farms Water Company, a corporation, defendants," appearing on the docket of this [1*] court as Tucson-Equity No. 94, appointed receivers of the properties and effects of the defendants, Valley Farms Water Company and Edwin R. Post, including the property hereinafter described; that the said Albert Steinfeld has heretofore resigned his office as such receiver and the defendant Mose Drachman is now the duly appointed, qualified and acting receiver thereof; that the property, canals, water ditches

*Page-number appearing at foot of page of original certified Transcript of Record.

and irrigation system hereinafter described and upon which the plaintiff claims a lien for the foreclosure of which this action is brought, is now in the possession of the said Mose Drachman, receiver as aforesaid, and through said receiver in the possession, control and under the direction of this Honorable Court; that the Fidelity Savings & Loan Association is a California corporation and has its principal office and place of business in Los Angeles, State aforesaid; that the Pima Farms Company is an Arizona corporation, having its principal office and place of business in Tucson, State aforesaid.

II.

That on and prior to the 16th day of October, 1919, and at all times subsequent thereto up to and including the date of the filing of the original complaint in this cause, the defendants Edwin R. Post, Edna S. Post, Valley Farms Water Company, Albert Steinfeld and Bettina V. Steinfeld, were owners and in possession of the following described canals and water ditches, sometimes known as the Valley Farms Water Company project or system, and also known as the Santa Cruz Valley Farms project, and Post project, situated in the County of Pima, State of Arizona, and described as beginning approximately nine miles northwest of Tucson, County and State aforesaid, and running thence [2] west along the Southern Pacific Railroad to the Pinal County line, including all of its rights of way, bed and banks and lands used in connection therewith, and its flumes, culverts, gates,

dams, wells, pumps and pumping plant supplying and intending to supply the said canals and water ditches with water, and to be used therewith for the irrigation of lands owned by the defendants and in their possession known as the Post project, also Valley Farms Water Company project, and also as Santa Cruz Valley Farms project, the same constituting an entire connected and related system of irrigation for said lands. That the said Edwin R. Post on and prior to the 16th of October, 1919, and at all times subsequent thereto, and until the filing of the original complaint herein, had charge or control of the construction of said canals, water ditches, flumes, culverts, gates, dams, wells, pumps and pumping plants, with the knowledge and consent of the other defendants named in this paragraph.

III

That on, to wit, the 16th day of October, 1919, the plaintiff entered into a written contract with the defendant Edwin R. Post acting for himself individually and as agent for the defendants named in the preceding paragraph for the furnishing of the labor of certain horses and mules, and of certain machinery, fixtures and tools to be used in the construction of said canals and water ditches and other works and structures as aforesaid, which contract is in words and figures as follows, to wit:

"AGREEMENT.

THIS AGREEMENT, made and entered into this 16th day of October, 1919, by and between T. M. CALDWELL of Phoenix, Arizona, as party

of the first part, and E. R. POST of Tucson, Arizona, as party of the second part,

WITNESSETH, That [3]

WHEREAS, the party of the first part is the owner of the livestock and other personal property hereinafter and more particularly described and is desirous of letting the use thereof to the party of the second part at the rental and upon the terms and conditions hereinafter set forth; and

WHEREAS, the party of the second part is desirous of hiring the use of said property at such rental and upon such terms and conditions;

NOW THEREFORE, in consideration of these premises, and of the sum of One (1) Dollar, lawful money of the United States, each to the other of the parties hereto paid, the receipt whereof is hereby acknowledged, and in consideration of the premises and covenants of each of the parties hereto hereinafter contained and by them hereafter to be kept and performed, it is agreed as follows, to wit:

1. That the said party of the first part does hereby let the use and deliver possession f. o. b. the cars at Phoenix, Maricopa County, Arizona, to the said party of the second part, and the said party of the second part does hereby hire the use and shall receive possession f. o. b. the cars at Phoenix aforesaid from the said party of the first part, the following described property at the following designated rental, to wit:

24 or more teams of mules and harness therefor, at $30.00 per mo. per team;

12 or more Fresno scrapers at $7.50 per mo. per scraper;

2 or more plows at $7.50 per mo. per plow;

4 or more 2-horse Fresno scrapers at $7.50 per mo. per scraper;

6 or more 12x14 feet tents at $5.00 per mo. per tent;

Mess equipment for 30 or more men at $1.00 per mo. per man;

4 or more wagons at $12.50 per mo. per wagon;

Necessary blacksmith equipment at $20.00 per month.

The foregoing specifically mentioned amount of property being the minimum amount usable hereunder, and any additional amount of any thereof shall be furnished as aforesaid by the party of the first part to and on the demand of the party of the second part; provided the first party be not required to furnish more than 80 head of mules altogether with equipment therefor and upon not less than two weeks notice.

2. The party of the first part shall purchase of the party of the second part not less than forty (40) acres of the land comprising the enterprise of the party of the second part; such land being either that certain 50 acre tract known and described as ————, and which has been heretofore examined and designated as preferable by the first party; or any other 40 acre tract in said project remaining unsold by October 20th, 1919, and which the first party may select on or before October 20th, 1919, the price of the tract being $150.00

per acre, with good and perfect title and accompanied by the Valley Farms Water Co. contract in the form now used for water contracts for water for said project, and the regularly printed forms of the party of the second part shall be used in the matter of the purchase, sale and conveyance of and the water respecting such land; [4]

3. The party of the second part shall defray the expense of the transportation of said property, after same shall be aboard the cars, from the loading point at Phoenix to the place where the said party of the second part shall establish his first camp;

4. Said property shall be in good workable and usable condition upon arrival at said first camp, and said party of the second part shall be in no wise liable or responsible for any injury whatever occurring to any of said property en route and prior to such arrival;

5. The party of the second part shall pay and be liable for all the necessary feeding and care of the live stock and the care, repair and upkeep of the implements and other of said property, and, excepting usual and ordinary wear and tear and acts of God and the death of live stock from natural cause, said party of the second part shall re-deliver said property to said party of the first part in as good condition as when delivered and received, and such re-delivery shall be made on cars at nearest shipping point by said party of the second part, if said first party so requests;

6. The rental provided for in condition 1 hereof shall be payable as follows, to wit: $400.00 per month thereof shall be retained and applied by the said party of the second part toward and on account of the payment of the purchase price of the land being purchased by the party of the first part from the party of the second part, as mentioned in condition 2 hereof, during the life of this agreement, unless said payments shall sooner complete such purchase; no rental payment shall be made until sixty (60) days next after the signing of this agreement and the arrival of said property on the lands of said party of the second part, but within five (5) days after the end of said sixty (60) day period settlement and deductions shall be made for the said period; thereafter said deductions for land payments and settlements for rentals shall be made on or before the 5th day of each month for the calendar month next theretofore preceding; and this agreement shall continue in force and effect until the rentals hereunder shall aggregate not less than the total sum of six thousand ($6,000) dollars, but it may be continued for such period of additional time as the said party of the second part shall require the use of said property;

7. All live stock dying or becoming unusable from other than natural cause shall be paid for by the said party of the second part at the rate of $150.00 per head;

8. All live stock dying or becoming unusable from natural causes, and all such of the other prop-

erty as shall by ordinary and usual wear and tear in due course wear out and become unusable, shall, upon demand of party of the second part, be replaced by the said party of the first part;

9. This agreement and all of the terms and conditions hereof shall be and hereby are made binding upon the heirs and assigns of the parties hereto.

IN WITNESS WHEREOF, the parties hereto have hereunto set their hands the day and year first hereinabove mentioned.

T. M. CALDWELL.
EDWIN POST." [5]

That subsequently and on, to wit, the first day of April, 1920, a further and supplemental agreement in writing was entered into between the plaintiff and the defendant Edwin R. Post, acting for himself individually and as agent for the defendants named in the preceding paragraph, by which it was agreed that the labor of certain horses and mules and the machinery, fixtures and tools described in the contract of October 16, 1919, above set forth, was to be further used by the said Post in and upon the construction of said canals and water ditches and other works and structures as aforesaid, upon the same terms and conditions as provided in said original written contract of October 16, 1919, which said written agreement of April 1, 1920, is in words and figures as follows, to wit:

"AGREEMENT.

THIS AGREEMENT, made and entered into this first day of April, 1920, by and between T. M.

CALDWELL, of Phoenix, Arizona, as party of the first part, and EDWIN R. POST, of Tucson, Arizona, as party of the second part, WITNESSETH: That,

WHEREAS under date of October 16, 1919, a contract was entered into by the parties above noted, covering the rental by party of the first part to party of the second part of stock and grading equipment, and

WHEREAS the agreement above referred to did not state any specified time during which this stock shall be available for use by party of the second part and whereas the party of the second part desires to continue the use of this stock until the first of June, 1920, and for a longer period provided party of the second part has other work which it is desired to use this stock for.

NOW, THEREFORE, in the consideration of these premises and of the sum of One Dollar, lawful money of the United States each to the other of the parties hereto paid, the receipt whereof is hereby acknowledged, and in consideration of the promises and covenants of each of the parties hereto hereinafter contained and by them hereafter to be kept and performed, it is agreed as follows, to wit:

First: That the party of the first part will rent to the party of the second part, under the same terms and conditions as are embodied in the agreement of October 16, 1919, the stock and equipment now in the possession of the party of the second part until the first of June, and for such longer

period as may be necessary to complete the construction work remaining to be done on that portion of the Santa Cruz Valley [6] Farms project lying south and east of the syphon crossing of the Santa Cruz River, a short distance above Rillito.

The party of the second part agrees to keep the stock and equipment of the party of the first part now in his possession under the same terms and conditions as provided for in the agreement of October 16, 1919, until June first, 1920, and for such longer period as may be necessary to complete that portion of the construction work on the Santa Cruz Valley Farms tract of the party of the second part, above referred to.

Second: This agreement and all of the terms and conditions hereof shall be and hereby are made binding upon the heirs and assigns of the parties hereto.

IN WITNESS WHEREOF the parties hereto have hereunto set their hands the day and year first hereinabove mentioned.

T. M. CALDWELL.
EDWIN R. POST."

IV.

That under and by virtue of said written agreements of October 16, 1919, and April 1, 1920, respectively, the plaintiff furnished for use and there was used by the said Edwin R. Post, in and upon the construction of the canals and water ditches hereinbefore described, the labor of the horses and mules and the machinery, fixtures and

tools mentioned in said contracts, all the property of this plaintiff, from the 16th day of October, 1919, to and including the 19th day of July, 1920; that the reasonable as well as the agreed value for the use of said horses, mules and equipment upon said work as aforesaid was the sum of Nine Thousand Six Hundred Ninety-two and 55/100 Dollars ($9,692.55); that all of said amount became due and payable from the said Post to this plaintiff on to wit, the 5th day of August, 1920, and that of said sum of $9,692.55 there has been paid thereon by the said Post the sum of Four Thousand Three Hundred Forty-one and 50/100 Dollars ($4,341.50), and no more, and that there is now due and owing to this plaintiff from the said Edwin R. Post, and from the defendant, [7] Mose Drachman, as receiver as aforesaid, for the use of said horses, mules and equipment in the building and constructing of said canals and water ditches hereinabove described a balance of Five Thousand Three Hundred Fifty-one and 5/100 Dollars ($5,351.05) after deducting all just credits and offsets.

V.

That within ninety days after the completion of said canals and water ditches as aforesaid, and on, to wit, the 19th day of October, 1920, the plaintiff made duplicate copies of a notice and claim of lien upon the canals, water ditches and property hereinabove described, and filed one copy thereof with the County Recorder of the County of Pima, State of Arizona, and served one copy thereof upon each of the defendants, Edwin R. Post, Valley

Farms Water Company, and Albert Steinfeld and Mose Drachman, as receivers aforesaid, and upon Albert Steinfeld individually, and Bettina Steinfeld, the owners of said improvements, which said duplicate copies of notice and claim of lien were signed and sworn to before an officer authorized to administer oaths in the County of Maricopa, State of Arizona, and had attached thereto a true copy of the written contracts under which said horses, mules and equipment were furnished as aforesaid, and contained—

(a) A general description of the lands and improvements to be charged with the lien, sufficient for identification;

(b) The name of the owner or reputed owner of the property concerned, and also the name of the person by whom the plaintiff was employed or to whom he furnished for use in the building and construction of said canals and water ditches the horses, mules and equipment described in said written contract; and [8]

(c) A statement of the plaintiff's demand after deducting all just credits and offsets.

VI.

This suit is filed by leave of this Honorable Court first had and obtained.

VII.

Plaintiff alleges that the defendants, Fidelity Savings & Loan Association and Pima Farms Company, assert some claim, right, title or interest in and to said canals and water ditches, including all of its rights of way, bed and banks, and land used

in connection therewith, and its flumes, culverts, gates, dams, wells, pumps and pumping plants supplying and intending to supply the said canals and water ditches with water, together with all appurtenances used therewith, but he alleges that any claim, right, title or interest they may have therein is subject and subordinate to plaintiff's said lien thereon.

WHEREFORE, plaintiff prays judgment—

(1) That he be adjudged to have a lien on said canals and water ditches, including all of its rights of way, bed and banks, and land used in connection therewith, and its flumes, culverts, gates, dams, wells, pumps and pumping plants supplying and intending to supply the said canals and water ditches with water, together with all appurtenances used therewith, for the sum of Five Thousand Three Hundred Fifty-one and 5/100 Dollars ($5,351.05), together with interest thereon from the 5th day of August, 1920, prior to all other liens, claims and demands thereon of the defendants, or any person claiming by, through or under them or either of them;

(2) That the defendants and each of them, and all persons claiming by, through or under them or either of them, [9] be foreclosed of all equity of redemption or other interest in said property;

(3) That the interests of the defendants and each of them in said property be sold as provided by law, and that from the proceeds of such sale the plaintiff be paid the amount of his lien aforesaid, and interest thereon from the 5th day of

August, 1920, together with the expenses of sale and costs of this action;

(4) That the plaintiff have judgment against the defendants, Edwin R. Post, Valley Farms Water Company, and Mose Drachman, as receiver aforesaid, for any deficiency that may remain due him on such sale;

(5) That plaintiff have such further judgment, decree or order as to the Court may seem meet.

THOS. ARMSTRONG, Jr.,
ERNEST W. LEWIS,
R. WM. KRAMER,
JAMES R. MOORE,
Solicitors for Plaintiff.

[Endorsed]: Filed May 7, 1923. United States District Court for the District of Arizona. C. R. McFall, Clerk. By R. C. McAllaster, Deputy Clerk. [10]

In the District Court of the United States in and for the District of Arizona.

TUCSON—EQUITY No. E—94.

ANCILLARY No. 3.

T. M. CALDWELL,

Plaintiff,

vs.

EDWIN R. POST, Doing Business Under the Firm Name and Style of EDWIN R. POST COMPANY, et al.,

Defendants.

Motion to Dismiss.

Come now the defendants Albert Steinfeld and Bettina V. Steinfeld, and move the Court to dismiss the amended bill of complaint of the plaintiff herein on the ground of insufficiency of fact to constitute a valid cause of action in equity against these defendants or either of them, in that said amended bill of complaint does not state facts sufficient to constitute a valid cause of action against these defendants or either of them.

WHEREFORE these defendants pray that this their motion be allowed and granted and for all proper orders and relief.

KINGAN, CAMPBELL & CONNOR,
Attorneys for Defendants Albert Steinfeld and Bettina V. Steinfeld.

[Endorsed]: Filed Apr. 22, 1922. C. R. McFall, Clerk. By Paul Dickason, Deputy. [11]

In the District Court of the United States in and for the District of Arizona.

TUCSON—EQUITY No. E—94.

ANCILLARY No. 3.

T. M. CALDWELL,

Plaintiff,

vs.

EDWIN R. POST, Doing Business Under the Firm Name and Style of EDWIN R. POST COMPANY, et al.,

Defendants.

Motion to Dismiss.

Comes now the defendant Pima Farms Company, a corporation, and moves the Court to dismiss the amended bill of complaint of the plaintiff herein on the ground of insufficiency of fact to constitute a valid cause of action in equity against this defendant, in that said amended bill of complaint does not state facts sufficient to constitute a valid cause of action against this defendant.

WHEREFORE, this defendant prays that this its motion be allowed and granted, and for all proper orders and relief.

KINGAN, CAMPBELL & CONNOR,
Attorneys for Defendant Pima Farms Company, a Corporation.

[Endorsed]: Filed Apr. 22, 1922. C. R. McFall, Clerk. By Paul Dickason, Deputy. [12]

In the District Court of the United States in and for the District of Arizona.

TUCSON—EQUITY No. E—94.

ANCILLARY No. 3.

T. M. CALDWELL,

Plaintiff,

vs.

EDWIN R. POST, Doing Business Under the Firm Name and Style of EDWIN R. POST COMPANY, et al.,

Defendants.

Motion to Dismiss.

Comes now the defendant Fidelity Savings & Loan Association, a corporation, and moves the Court to dismiss the amended bill of complaint of the plaintiff herein on the ground of insufficiency of fact to constitute a valid cause of action in equity against this defendant, in that said amended bill of complaint does not state facts sufficient to constitute a valid cause of action against this defendant.

WHEREFORE, this defendant prays that this its motion be allowed and granted, and for all proper orders and relief.

KINGAN, CAMPBELL & CONNOR,
Attorneys for Defendant Fidelity Savings & Loan Association, a Corporation.

[Endorsed]: Filed Apr. 22, 1922. C. R. McFall, Clerk. By Paul Dickason, Deputy. [13]

In the District Court of the United States in and for the District of Arizona.

TUCSON—EQUITY No. E—94.

ANCILLARY No. 3.

T. M. CALDWELL,

Plaintiff,

vs.

EDWIN R. POST et al.,

Defendants.

Decree Dismissing Second Amended Complaint as Against Albert Steinfeld, Bettina Steinfeld, Fidelity Savings & Loan Association and Pima Farms Company.

It having been stipulated in open court between counsel for the plaintiff and for the defendants Albert Steinfeld, Bettina Steinfeld, Fidelity Savings & Loan Association, a corporation, and Pima Farms Company, a corporation, that the motion of said defendants to dismiss the amended complaint, heretofore sustained, should be considered as having been refiled as to the second amended complaint, and this cause as to the said defendants having been heard upon the second amended bill of complaint, and said defendants' motions to dismiss the same, and said motions to dismiss having been sustained, and plaintiff having elected to stand upon his pleadings, and the Court being fully advised in the premises,

It is by the Court CONSIDERED, ADJUDGED AND DECREED:

That the second amended bill of complaint of plaintiff be and the same is hereby dismissed for want of equity as against the defendants Albert Steinfeld, Bettina Steinfeld, Fidelity Savings & Loan Association, a corporation, and Pima Farms Company, a corporation, and that said defendants have and recover of the plaintiff their costs herein laid out and expended, to all of which the plaintiff excepts.

Done in open court this 7th day of May, 1923.
By the Court:

M. T. DOOLING,
Judge.

Approved as to form May 12, 1923.
KINGAN, CAMPBELL & CONNER.

Filed May 12, 1923. United States District Court for the District of Arizona. C. R. McFall, Clerk. By Agnes Borrego, Deputy Clerk. [14]

In the District Court of the United States for the District of Arizona.

No. E—94—TUCSON.

ANCILLARY No. 3.

T. M. CALDWELL,
Plaintiff,

vs.

EDWIN R. POST, Doing Business Under the Firm Name and Style of EDWIN R. POST COMPANY, etc., et al.,
Defendants.

Opinion and Order Sustaining Motions to Dismiss.

ARMSTRONG, LEWIS & KRAMER, Attorneys for Plaintiff.

KINGAN, CAMPBELL & CONNER, Attorneys for all Defendants except Fidelity Savings & Loan Association.

Plaintiff seeks to have established and enforced

a lien upon certain canals, and water ditches, rights of way, bed and banks and land used in connection therewith, together with the flumes, culverts, gates, dams, wells, pumps and pumping plants supplying and intending to supply the said canals and ditches with water, the said canals, ditches, etc., being those of Valley Farms Water Company project, also known as the Santa Cruz Valley Farms project, and the Post project, situated in Pima County, and described particularly in the complaint. It is averred that the defendants, other than Pima Farms Company and Fidelity Savings and Loan Association, are the owners and in possession of the property, but there is no averment as to who owned the property at the time the contract sued upon was entered into, or the work alleged was done. It is averred that plaintiff entered into a written contract with defendant Edwin R. Post, for the furnishing to him of certain horses, mules and construction [14½] equipment to be used in and upon the building and construction of the canals and water ditches described, and the said contract is set out in full. The contract itself makes no mention of where or for what purpose the property thus to be furnished was to be used. It is further averred, however, that by virtue of said agreement, and a supplemental written agreement extending the time of use of said property, plaintiff furnished for use, and there was used by said Post in and upon the construction of the canals and water ditches described, the horses, mules and construction equip-

ment mentioned in the contracts, and that the reasonable as well as the agreed value for the use of said horses, mules and equipment upon said work was $9,692.55, and that of said amount only $4,341.50 has been paid by said Post, and that there is still due from said Post $5,351.05 for the use of said horses, mules and equipment in the construction of said canals and water ditches after deducting all just credits and offsets. Then follow appropriate averments of the filing and delivery of the necessary notices to create a lien under the Arizona statute.

The complaint is challenged by motions to dismiss.

Whatever may be the rule where horses and equipment are furnished by their owner directly to the owner of the property to be improved, it seems to be settled that where they are furnished by the owner to a third party who in turn uses them in the improvement of the property of another, if there be any lien existing at all, such lien exists in favor of the third party who stands in the place of the owner by reason of his contract of hiring. McMullin vs. McMullin, 42 Atl. 500; Richardson vs. Hoxie, 38 Atl. 142; Edwards vs. Lumber Co., 84 N. W. 150; Mabie vs. Sines, 52 N. W. 1007; McKinnon vs. Lumber Co., 138 N. W. 781; Lohman vs. Peterson, 58 N. W. 407; McAuliffe vs Jorgenson, 82 N. W. 706, and Potter Co. vs. Myer, 86 N. E. 838. [15]

As the teams were furnished to Post, who is not averred to have been the owner of the canals,

ditches, etc., at the time of the hiring and use by him of the teams and equipment, if there be any right of lien accorded by the Arizona statute, such right would be accorded to Post, and not to the plaintiff. For this reason the present complaint does not state a cause of action and the motions to dismiss will be granted.

April 24th, 1923.

M. T. DOOLING,
Judge.

[Endorsed]: Filed Apr. 24, 1923. United States District Court for the District of Arizona. C. R. McFall, Clerk. By. R. C. McAllaster, Deputy Clerk. [16]

In the District Court of the United States in and for the District of Arizona.

TUCSON—EQUITY No. E—94.

ANCILLARY No. 3.

T. M. CALDWELL,

Plaintiff,

vs.

EDWIN R. POST et al.,

Defendants.

Petition for Appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

The above-named plaintiff considering himself aggrieved by the decree made and entered on the 7th day of May, 1923, in the above-entitled cause,

dismissing his second amended complaint as to the defendants Albert Steinfeld, Bettina Steinfeld, Fidelity Savings & Loan Association and Pima Farms Company, does hereby appeal from said order and decree to the United States Circuit Court of Appeals for the Ninth Circuit, for the reasons specified in the assignments of error filed herewith, and he prays that this appeal may be allowed, and that a transcript of the record of the proceedings and papers upon which said order and decree was made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit.

THOS. ARMSTRONG, Jr.,
ERNEST W. LEWIS,
R. WM. KRAMER,
JAMES R. MOORE,
Solicitors for Plaintiff.

Order Allowing Appeal and Fixing Bond.

The above and foregoing application for appeal and assignments of error of the plaintiff being presented to the Court [17] with said application for appeal, it is ORDERED that said appeal be allowed as prayed for.

Appeal bond fixed at Three Hundred Dollars ($300.00).

Dated this 12th day of May, 1923.

M. T. DOOLING,
Judge.

[Endorsed]: Filed May 12, 1923. United States District Court for the District of Arizona. C. R. McFall, Clerk. By Agnes Borrego, Deputy Clerk. [18]

In the District Court of the United States in and for the District of Arizona.

TUCSON—EQUITY No. E—94.

ANCILLARY No. 3.

T. M. CALDWELL,

Plaintiff,

vs.

EDWIN R. POST et al.,

Defendants.

Assignments of Error on Appeal.

The plaintiff says that the decree rendered in the above-entitled cause on May 7th, 1923, dismissing his bill of complaint as against the defendants Albert Steinfeld, Bettina Steinfeld, Fidelity Savings & Loan Association, a corporation, and Pima Farms Company, a corporation, is erroneous, and against his just rights, for the following reasons:

(1) That under the facts alleged in his second amended bill of complaint and the law of the State of Arizona, he is entitled to the relief prayed for in his second amended complaint against said defendants and each of them.

(2) Because the Court erred in sustaining the motions of the defendants Albert Steinfeld, and Bettina Steinfeld, his wife, to dismiss the plaintiff's second amended complaint.

(3) Because the Court erred in sustaining the motion of the defendant Fidelity Savings & Loan Association to dismiss the plaintiff's second amended complaint.

(4) Because the Court erred in sustaining the motion of the defendant Pima Farms Company to dismiss the plaintiff's second amended complaint.

(5) Because, under the facts alleged in the plaintiff's second amended complaint, and the law of the State of Arizona, the plaintiff is entitled to a lien upon the ditches, canals [19] and improvements described in the plaintiff's second amended complaint for the payment of the amount alleged to be due him on account of the labor of horses, machinery, tools and fixtures furnished by the plaintiff to be used in the construction of the canals and water ditches and other works and structures mentioned in the second amended complaint, under the terms of the contracts set out in the second amended complaint.

WHEREFORE, plaintiff prays that the said order and decree be reversed, and that the Court be directed to vacate said decree and to enter an order overruling the respective motions of said defendants to dismiss plaintiff's second amended bill of complaint.

THOS. ARMSTRONG, Jr.,
ERNEST W. LEWIS,
R. WM. KRAMER,
JAMES R. MOORE,
Solicitors for Plaintiff.

[Endorsed]: Received copy of the within this 12th day of May, 1923.

KINGAN, CAMPBELL & CONNER.

Filed May 12, 1923. United States District Court for the District of Arizona. C. R. McFall, Clerk. By Agnes Borrego, Deputy Clerk. [20]

In the District Court of the United States, in and for the District of Arizona.

TUCSON—EQUITY No. E—94.

ANCILLARY No. 3.

T. M. CALDWELL,

Appellant,

vs.

ALBERT STEINFELD, BETTINA STEINFELD, FIDELITY SAVINGS & LOAN ASSOCIATION, a Corporation, and PIMA FARMS COMPANY, a Corporation,

Appellees.

Citation on Appeal (Copy).

The President of the United States to Albert Steinfeld, Bettina Steinfeld, Fidelity Savings & Loan Association and Pima Farms Company, GREETINGS:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit, to be held in the City of San Francisco, State of California, within thirty (30) days from the date of this writ, pursuant to an appeal filed in the office of the Clerk of the District Court of the United States, District of Arizona, wherein T. M. Caldwell is complainant and

Albert Steinfeld, Bettina Steinfeld, Fidelity Savings & Loan Association, a corporation, and Pima Farms Company, a corporation, et al., are defendants, to show cause, if any there be, why the judgment in such appeal mentioned should not be corrected and speedy justice should not be done in their behalf.

M. T. DOOL-

M. T. D. WITNESS the Honorable ~~W. H. SAW-~~ ING

~~TELLE,~~ Judge of the United States District Court for the District of Arizona, this 11 day of May, 1923.

M. T. DOOLING,
Judge. [21]

Service of the within citation and receipt of a copy thereof admitted this 11 day of May, 1923.

SAMUEL L. KINGAN,
JOHN H. CAMPBELL,
ARCHIE R. CONNER,
Solicitors for Appellees.

[Endorsed]: Copy of within received this 12th day of May, 1923.

KINGAN, CAMPBELL & CONNER.

Filed May 12, 1923. United States District Court for the District of Arizona. C. R. McFall, Clerk. By. Agnes Borrego, Deputy Clerk [22]

In the District Court of the United States, in and for the District of Arizona.

TUCSON—EQUITY No. E—94.

ANCILLARY No. 3.

T. M. CALDWELL,

Plaintiff,

vs.

EDWIN R. POST et al.,

Defendants.

Bond on Appeal.

KNOW ALL MEN BY THESE PRESENTS: That we, T. M. Caldwell, as principal, and United States Fidelity & Guaranty Company, a corporation duly organized under the laws of the State of Maryland and authorized to transact a surety business in the State of Arizona, as surety, are held and firmly bound unto Albert Steinfeld, Bettina Steinfeld, Fidelity Savings & Loan Association, a corporation, and Pima Farms Company, a corporation, in the full and just sum of Three Hundred Dollars ($300.00), to be paid to the said obligees, their certain attorneys, executors, administrators or assigns; to which payment well and truly to be made we bind ourselves, our heirs, executors, administrators, successors and assigns, jointly and severally, by these presents.

Signed with our seals and dated this 10 day of May, 1923.

WHEREAS, lately, in the District Court of the United States for the District of Arizona, in a suit

depending in said court between the above-named plaintiffs and defendants, a decree was rendered against the said plaintiff, and plaintiff having obtained an appeal and filed a copy thereof in the office of the Clerk of said Court, to reverse the decree in the aforesaid suit, and a citation directed to the said Albert [23] Steinfeld, Bettina Steinfeld, Fidelity Savings & Loan Association, and Pima Farms Company, citing and admonishing each of them to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit to be holden in the City of San Francisco, State of California,

NOW, THE CONDITION of the foregoing obligation is such that if the said T. M. Caldwell shall prosecute his appeal to effect, and answer all damages and costs if he shall fail to make his plea good, then the above obligation shall be void, else to remain in full force and virtue.

IN WITNESS WHEREOF the principal has hereto set his hand and seal, and the surety has caused its corporate name to be hereto subscribed and its corporate seal to be hereto affixed by its duly authorized and appointed attorney in fact, this 10 day of May, 1923.

T. M. CALDWELL, (Seal)

UNITED STATES FIDELITY & GUARANTY CO.,

[Corporate Seal] By JULIAN A. GANZ,
Attorney-in-fact.

Approved:

M. T. DOOLING,
United States District Judge.

[Endorsed]: Filed May 12, 1923. United States District Court for the District of Arizona. C. R. McFall, Clerk. By Agnes Borrego, Deputy Clerk. [24]

In the District Court of the United States, in and for the District of Arizona.

TUCSON—EQUITY No. E—94.

ANCILLARY No. 3.

T. M. CALDWELL,

Appellant,

vs.

EDWIN R. POST et al.,

Appellees.

Praecipe for Transcript of Record.

To the Clerk:

You are requested to make a transcript of record to be filed in the United States Circuit Court of Appeals for the Ninth Circuit, pursuant to appeal allowed in the above-entitled cause, and to include in such transcript of record the following, and no other, papers or exhibits, to wit:

(1) Second amended complaint.

(2) Motion of defendants Albert Steinfeld and Bettina Steinfeld, his wife, to dismiss amended complaint.

(3) Motion of defendant Pima Farms Company to dismiss amended complaint.

(4) Motion of defendant Fidelity Savings & Loan Association to dismiss amended complaint.

(5) Order sustaining motions to dismiss, and decree of dismissal, of second amended complaint.

(6) Opinion of District Judge M. T. Dooling, sustaining motions of defendants Albert Steinfeld, Bettina Steinfeld, Pima Farms Company and Fidelity Savings & Loan Association to dismiss amended complaint.

(7) Petition for appeal.

(8) Assignments of error. [25]

(9) Order allowing appeal.

(10) Citation on appeal.

(11) Appeal bond.

(12) This praecipe.

Respectfully,

THOS. ARMSTRONG,
ERNEST W. LEWIS,
R. WM. KRAMER,
JAMES R. MOORE,
Solicitors for Appellant.

Service of the foregoing praecipe accepted and copy thereof acknowledged this 11 day of May, 1923.

SAMUEL L. KINGAN,
JOHN H. CAMPBELL,
ARCHIE R. CONNER,
Solicitors for Appellees.

[Endorsed]: Filed May 12, 1923. United States District Court for the District of Arizona. C. R. McFall, Clerk. By Agnes Borrego, Deputy Clerk. [26]

In the District Court of the United States, in and for the District of Arizona.

TUCSON—EQUITY No. E—94.

ANCILLARY No. 3.

T. M. CALDWELL,

Appellant,

vs.

ALBERT STEINFELD, BETTINA STEINFELD, FIDELITY SAVINGS & LOAN ASSOCIATION, a Corporation, and PIMA FARMS COMPANY, a Corporation,

Appellees.

Citation on Appeal (Original)

The President of the United States to Albert Steinfeld, Bettina Steinfeld, Fidelity Savings & Loan Association and Pima Farms Company, GREETINGS:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit, to be held in the City of San Francisco, State of California, within thirty (30) days from the date of this writ, pursuant to an appeal filed in the office of the Clerk of the District Court of the United States, District of Arizona, wherein T. M. Caldwell is complainant and Albert Steinfeld, Bettina Steinfeld, Fidelity Savings & Loan Association, a corporation, and Pima Farms Company, a corporation, et al., are defendants, to show cause, if any there be, why the judgment in such appeal mentioned should not be corrected

and speedy justice should not be done in their behalf.

M. T. DOOL-

M. T. D. WITNESS the Honorable ~~W.~~ ~~H.~~ ~~SAW~~-ING,

~~TELLE,~~ Judge of the United States District Court for the District of Arizona this 11th day of May, 1923.

M. T. DOOLING,
Judge. [27]

Service of the within citation and receipt of a copy thereof admitted this 11th day of May, 1923.

SAMUEL L. KINGAN,
JOHN H. CAMPBELL,
ARCHIE R. CONNER,
Solicitors for Appellees [28]

[Endorsed]: Filed May 12, 1923. United States District Court for the District of Arizona. C. R. McFall, Clerk. By Agnes Borrego, Deputy Clerk.

Copy of within received this 12th day of May, 1923.

KINGAN, CAMPBELL & CONNER. [29]

In the District Court of the United States for the District of Arizona.

No. E—94 (Tucson.)

ANCILLARY SUIT No. 3.

T. M. CALDWELL,

Appellant,

vs.

EDWIN R. POST et al.,

Appellees.

Certificate of Clerk U. S. District Court, to Transcript of Record.

United States of America,
District of Arizona,—ss.

I, C. R. McFall, Clerk of the United States District Court for the District of Arizona, do hereby certify that I am the custodian of the records, papers and files of the United States District Court for the District of Arizona, including the records, papers and files in the case of T. M. Caldwell vs. Edwin R. Post et al., numbered E—94–A3 (Tucson) on the Docket of said Court.

I further certify that the attached pages, numbered one to 26, inclusive, contain a full, true and correct transcript of certain records and *and* proceedings in said case, as called for in the praecipe designating parts of record to be included in transcript on appeal, filed in this case and made a part of the transcript attached hereto, as the same ap-

pear from the originals of record and on file in my office as such Clerk, in the City of Tucson, State and District aforesaid.

I further certify that the Clerk's fees for preparing the transcript of this record amount to Eighteen and 05/100 ($18.05) Dollars, and that the same have been paid to me in full by counsel for the appellant, T. M. Caldwell.

I further certify that the original citation issued in this cause is attached hereto and made a part hereof.

WITNESS my hand and the seal of said court, this 22d day of May, 1923.

[Seal] C. R. McFALL,
Clerk.
By Agnes Borrego,
Deputy Clerk.

[Endorsed]: No. 4040. United States Circuit Court of Appeals for the Ninth Circuit. T. M. Caldwell, Appellant, vs. Albert Steinfeld, Bettina Steinfeld, Fidelity Savings & Loan Association, a Corporation, and Pima Farms Company, a Corporation et al., Appellees. Transcript of the Record. Upon Appeal from the United States District Court for the District of Arizona.

Filed May 28, 1923.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.
By Paul P. O'Brien,
Deputy Clerk.

No. 4040

IN THE

United States
Circuit Court of Appeals,
FOR THE NINTH CIRCUIT

T. M. CALDWELL,
Appellant,

vs.

ALBERT STEINFELD, BETTINA STEINFELD, FIDELITY & SAVINGS & LOAN ASSOCIATION, a Corporation, and PIMA FARMS COMPANY, a Corporation, et al.,
Appellees.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA.

ABSTRACT, SPECIFICATION OF ERRORS AND BRIEF FOR THE APPELLANT.

THOMAS ARMSTRONG, JR.,
ERNEST W. LEWIS,
R. WM. KRAMER,
JAMES R. MOORE,
Solicitors for Appellant.

ARMSTRONG, LEWIS & KRAMER,
National Bank of Arizona Building,
Phoenix, Arizona.

BOWER CO., PHOENIX

FILED
JUL 21 1923

No. 4040

IN THE

United States
Circuit Court of Appeals,
FOR THE NINTH CIRCUIT

T. M. CALDWELL,

Appellant,

vs.

ALBERT STEINFELD, BETTINA STEINFELD, FIDELITY & SAVINGS & LOAN ASSOCIATION, a Corporation, and PIMA FARMS COMPANY, a Corporation, et al.,

Appellees.

ABSTRACT AND STATEMENT OF THE CASE.

On May 27, 1923, T. M. Caldwell filed his Seeond Amended Complaint against the defendants, in which it was alleged, among other things:

> "That on and prior to the 16th day of October, 1919, and at all times subsequent thereto up to and including the date of the filing of the original com-

plaint in this cause, the defendants Edwin R. Post. Edna S. Post, Valley Farms Water Company, Albert Steinfeld and Bettina V. Steinfeld, were owners and in possession of the following described canals and water ditches, sometimes known as the Valley Farms Water Company project or system, and also known as the Santa Cruz Valley Farms project, and Post project, situated in the County of Pima, State of Arizona, and described as beginning approximately nine miles northwest of Tucson, County and State aforesaid, and running thence west along the Southern Pacific Railroad to the Pinal County line, including all of its rights of way, bed and banks and lands used in connection therewith, and its flumes, culverts, gates, dams, wells, pumps and pumping plant supplying and intending to supply the said canals and water ditches with water, and to be used therewith for the irrigation of lands owned by the defendants and in their possession known as the Post project, also Valley Farms Water Company project, and also as Santa Cruz Valley Farms project, the same constituting an entire connected and related system of irrigation for said lands. That the said Edwin R. Post on and prior to the 16th of October, 1919, and at all times subsequent thereto, and until the filing of the original complaint herein, had charge or control of the construction of said canals, water ditches, flumes, culverts, gates, dams, wells, pumps and pumping plants, with the knowledge and consent of the other defendants named in this paragraph.'' (Par. II, Second Amended Bill of Complaint, Tr. p. 3-4.)

That on the 16th day of October, 1919, plaintiff entered into a written contract with the defendant Edwin

R. Post, acting for himself individually and as agent for the defendants Edna S. Post, Valley Farms Water Company, Albert Steinfeld and Bettina Steinfeld, for the furnishing of the labor of certain horses and mules and of certain machinery, fixtures and tools to be used in the construction of the canals, water ditches and other works and structures, more particularly described in Paragraph II of the Second Amended Complaint above quoted.

The written agreement is set out at length in Paragraph III of the Second Amended Complaint, and provided for the furnishing of the following described personal property, at the price therein agreed upon:

24 or more teams of mules and harness therefor, at $30.00 per mo. per team;

12 or more Fresno scrapers at $7.50 per mo. per scraper;

2 or more plows at $7.50 per mo. per plow;

4 or more 2-horse Fresno scrapers at $7.50 per mo. per scraper;

6 or more 12x14 feet tents at $5.00 per mo. per tent;

Mess equipment for 30 or more men at $1.00 per mo. per man;

4 or more wagons at $12.50 per mo. per wagon;

Necessary blacksmith equipment at $20.00 per month.

The original agreement did not provide any specific time during which the livestock, tools and equipment should be available for use by Post; and on April 1,

1920, a supplemental contract was entered into between the plaintiff and Edwin R. Post, whereby it was agreed that the latter should have the use of said livestock, tools and equipment under the terms of the original contract until the first day of June, 1920, and for such longer period as may be necessary to complete that portion of the construction work on the Santa Cruz Valley Farms tract.

It is further alleged that under and by virtue of said written agreements of October 16, 1919, and April 1, 1920, the plaintiff furnished for use and there was used by the said Edwin R. Post in and upon the construction of canals and water ditches hereinbefore described the labor of horses and mules, and machinery, fixtures and tools mentioned in said contracts, up to and including the 19th day of June, 1920, of the reasonable as well as agreed value of $9,692.55, of which amount $4,341.50 has been paid, leaving a balance due, after deducting all just claims and offsets, of $5,351.05. Then follows allegations of the filing in the office of the Recorder of Pima County, Arizona, and the serving of the necessary statements for the purpose of fixing a lien under the Arizona statutes. It is further alleged that the Fidelity Savings & Loan Association and Pima Farms Company, defendants, assert some claim, title or interest in and to said canals and water ditches, etc., but that any claim they may have is subject and subordinate to plaintiff's lien.

Complaint prays for the following relief:

"(1) That he be adjudged to have a lien on said canals and water ditches, includingg all of its rights of way, bed and banks, and land used in connection

therewith, and its flumes, culverts, gates, dams, wells, pumps and pumping plants supplying and intending to supply the said canals and water ditches with water, together with all appurtenances used therewith, for the sum of Five Thousand Three Hundred Fifty-one and 5/100 Dollars ($5,351.05), together with interest thereon from the 5th day of August, 1920, prior to all other liens, claims and demands thereon of the defendants, or any person claiming by, through or under them or either of them;

"(2) That the defendants and each of them, and all persons claiming by, through or under them, or either of them, be foreclosed of all equity of redemption or other interest in said property;

"(3) That the interests of the defendants and each of them in said property be sold as provided by law, and that from the proceeds of such sale the plaintiff be paid the amount of his lien aforesaid, and interest thereon from the 5th day of August, 1920, together with the expenses of sale and costs of this action;

"(4) That the plaintiff have judgment against the defendants, Edwin R. Post, Valley Farms Water Company, and Mose Drachman, as receiver aforesaid, for any deficiency that may remain due him on such sale;

"(5) That plaintiff have such further judgment, decree or order as to the Court may seem meet."

The defendants Albert Steinfeld, Bettina Steinfeld, Pima Farms Company, and Fidelity Savings & Loan

Association, having theretofore filed their motions to dismiss plaintiff's amended complaint, upon the ground that it did not state facts sufficint to constitute a cause of action against said defendants or any one of them, and said motions having been sustained for the reasons set forth in the opinion, (pages 20-23, Transcript of Record) it was on May 7, 1922, upon plaintiff being given leave to file his second amended complaint, stipulated in open Court, by the solicitors for plaintiff and the last above named defendants, that said defendants' motion to dismiss the amended complaint might be considered as having been refiled as to the second amended complaint; and thereupon said motions were submitted and sustained as to the second amended complaint. Plaintiff declined to plead further, and decree dismissing second amended complaint as against said defendants was rendered.

On May 12, 1923, plaintiff, after having filed assignments of error on appeal, presented same together with his petition for appeal, which said petition was forthwith granted, and appeal bond fixed at $300.00. Bond was duly given and approved,citation on appeal issued and served, praecipe for transcript of record served and filed.

Thereafter, on the 28th day of May, 1923, transcript of record was filed in the office of the Clerk of the Circuit Court of Appeals for the Ninth Circuit.

Plaintiff's assignments of error are as follows:

> "The plaintiff says that the decree rendered in the above-entitled cause on May 7th, 1923, dismissing his bill of complaint as against the defendants Albert

Steinfeld, Bettina Steinfeld, Fidelity Savings & Loan Association, a corporation, and Pima Farms Company, a corporation, is erroneous, and against his just rights, for the following reasons:

"(1) That under the facts alleged in his second amended bill of complaint and the law of the State of Arizona, he is entitled to the relief prayed for in his second amended complaint against said defendants and each of them.

"(2) Because the Court erred in sustaining the motions of the defendants Albert Steinfeld, and Bettina Steinfeld, his wife, to dismiss the plaintiff's second amended complaint.

"(3) Because the Court erred in sustaining the motion of the defendant Fidelity Savings & Loan Association to dismiss the plaintiff's second amended complaint.

"(4) Because the Court erred in sustaining the motion of the defendant Pima Farms Company to dismiss the plaintiff's second amended complaint.

"(5) Because, under the facts alleged in the plaintiff's second amended complaint, and the law of the State of Arizona, the plaintiff is entitled to a lien upon the ditches, canals and improvements described in the plaintiff's second amended complaint for the payment of the amount alleged to be due him on account of the labor of horses, machinery, tools and fixtures furnished by the plaintiff to be used in the construction of the canals and water ditches and other works and structures mentioned in the second

amended complaint, under the terms of the contracts set out in the second amended complaint."

BRIEF AND ARGUMENT.

Only one question, and that one of law, is presented by this appeal, viz:

Whether, under the provisions of Sections 3639 et seq., Revised Statutes of Arizona, 1913, Civil Code, the plaintiff is entitled to a lien for the reasonable and agreed value of horses, fixtures or tools rented directly to a joint owner of the premises for the purpose of being used in the construction of improvements or structures thereon.

Section 3039, supra, is as follows:

> "Every person, firm or corporation who may labor or furnish materials, machinery, fixtures or tools to be used in the construction, alteration, erection, repair or completion of any building or other structure or improvement whatever shall have a lien on such house, building, structure or improvements for the work or labor done or materials, machinery, fixtures or tools furnished, whether said work was done or articles furnished at the instance of the owner of the building, or improvement, or his agent. The lien herein provided shall extend to the lot or lots of land necessarily connected with the building, structure or improvement made or erected; and every contractor, subcontractor, architect, builder or other person having charge or control of the construction, alteration, or repair, either in whole or in part, of any building or other structure or improvement, shall be held to be the agent of the owner for the purposes of this chapter, and the

owner shall be liable, under the terms hereof, for the reasonable value of labor or materials furnished to an agent."

In the case of Mendoza et al. v. Central Forest Co., decided by the California District Court of Appeals on May 17, 1918, and rehearing denied by the Supreme Court on July 15, 1918, (174 Pac. 359) it was held as follows:

"Farm development, consisting of ditches, drains, embankments, and roads, so correlated as to form one harmonious entity, designed to convey water to and distribute it over the land, and constituting a permanent improveemnt to the land, increasing its value, is a 'structure,' within Code Civ. Proc. Sec 1183, providing for mechanic's lien on specified improvements 'or other structures'."

The lower court in its written opinion filed at the time it sustained the motion to dismiss the amended complaint, used the following language:

"Whatever may be the rule where horses and equipment are furnished by their owner directly to the owner of the property to be improved, it seems to be settled that where they are furnished by the owner to a third party who in turn uses them in the improvement of the property of another, if there be any lien existing at all, such lien exists in favor of the third party who stands in the place of the owner by reason of his contract of hiring. McMullin vs. McMullin, 42 Atl. 500; Richardson vs. Hoxie, 38 Atl. 142; Edwards vs. Lumber Co., 84 N. W. 150; Mabie vs. Sines, 52 N. W. 1007; McKinnon vs. Lumber Co.,

138 N. W. 781; Lohman vs. Peterson, 58 N. W. 407; McAuliffe vs. Jorgenson, 82 N. W. 706, and Potter Co. vs. Myer, 86 N. E. 383.

From the foregoing it is impossible to tell what the ruling of the Court would have been had the lien been claimed on a contract entered into between plaintiff and all the owners of the realty instead of just one owner. The second amended complaint, in the opinion of counsel by who it was drafted, met the objection to the amended complaint pointed out by the Court in its opinion as follows:

> "It is averred that the defendants, other than Pima Farms Company and Fidelity Savings and Loan Association, are the owners and in possession of the property, but there is no averment as to who owned the property at the time the contract sued upon was entered into, or the work alleged was done."

While the Court did not file a written opinion at the time it sustained the motions to dismiss the second amended complaint, it stated from the bench that the second amended complaint was defective in the same respect as the amended complaint, the Court evidently taking the view that one owner in possession of property and in charge of the construction of improvements and structures thereon, with the knowledge and consent of the other owners, cannot make a contract for the hiring of teams, machinery, tools and fixtures to be used in the construction of such structures and improvements which will entitle the person furnishing the same to a lien under the provisions of the Arizona statute.

In *Wood, Curtis & Co. vs. El Dorado Lumber Co. et al.,* 94 Pac., page 877-878, decided by the Supreme Court of California in 1908, the plaintiff had hired for a stipulated price a number of horses to a contractor engaged in the building of a railroad for the defendant, and sought to fix upon the railroad a lien for the amount due from the contractor for hire of the horses. Under the California statute as it then existed, no lien was given for the furnishing of "machinery, fixtures, or tools" to be used in the construction, etc., of any improvement or structure, and the lien was therefore denied. However, in that case the Court gives a very good definition of the essential meaning of "horses, etc., so furnished," which is as follows:

> "The fact that the personal property which was so turned over consisted of horses and their harness should not be allowed to cloud the issue. The horses, as horses, were no more entitled to liens than were the harnesses themselves. Each and both together were but convenient appliances for the doing of specific work. In the ultimate analysis there is no difference in principle whether draying is done by horses and wagons, or by automobile trucks; whether grading is done by horses and scrapers, or by traction engines and steam paddies. One and all are in their essence but tools and machinery."
>
> *Wood, Curtis & Co. v. El Dorado Lumber Co. et al.,* 94 Pac. 877-878.

From the language of the opinion above quoted, it is quite evident that had the California statute under consideration given a lien for "Machinery, fixtures or

tools'' as does the Arizona statute under which plaintiff claims his lien, the Court would have held that the plaintiff in the *Wood, Curtis & Company vs. El Dorado Lumber Co.* case was entitled to a lien upon the railroad for the reasonable value for use of horses and harness furnished the contractor to be used in its construction.

> ''This action is brought to enforce the statutory lien, provided by Chapter 95, Laws 1877, upon the logs of the appellants, for the labor and services of the respondent, by his teams and servants, in putting them into the Chippewa river. It is in proof that the respondent himself, personally and manually, did but little of such work, and that it was done mainly by his teams and servants; and it is contended that for such services by others in the work, and in using the teams, although by the employment and for the use of the respondent, the statute does not confer a lien upon the logs for his benefit.
>
> ''This cannot be the construction of our statute, whatever may be the construction of similar statutes of other states, of different language, as in Maine, where the statute expressly limits the lien to *personal* services. There is in our statute no such restrictive words, and the language, 'labor and services,' should be construed as broadly as its common use will warrant, which would include such labor and services, when performed by servants and agents, as well as personally, as in the common count in *assumpsit,* for work and labor. The lien being given as well to any 'company or corporation,' must necassarily include labor and services not personally and manually performed. That the labor in this case was performed for the contractor with the owners of the logs, or his sub-contractor, is no ob-

jection to the lien claimed. Munger v. Lenroot, 32 Wis. 541."

Hogan vs. O'Neill et al., 5 N. W. 494-495.

In *Chicago & N. E. R. vs. Sturgis,* 7 N. W. 213, it was held that the owner of horses was entitled to a lien for the reasonable value of services performed by them under contract of hiring, the court saying:

"The law limits its protection to the one who labors, and does not extend it to the one who merely hires out the labor of others. But the labor done by a man's team may be fairly regarded as labor done by him within the meaning of this statute. No right arises to any one out of its service except to him. Persons in his employment have distinct rights of their own."

In *Perry et al. v. Murphy et al.,* 57 N. W. 792, the Supreme Court of Minnesota held that one who lets his teams and teamsters to a sub-contractor to do work in constructing a railway is entitled to a lien, and in so holding, said:

"The defendant contends that Ballard was not entitled to a lien, because his claim was neither as a contractor (or sub-contractor) or for skilled workmen or a material man or laborer.

"The case comes under laws 1889, c. 200, sec. 3, which reads: 'Whoever performs labor, or furnishes skill, material or machinery for the construction, alteration or repair of any line of railway,' etc., 'shall have a lien to secure the contract price, or value of the same, upon such line of railway, tele-

graph line, depot, bridge, fence, or other structure appertaining to such line of railway,' etc., 'and upon all franchises, privileges and immunities, and all rights of way of or appertaining to any of the several lines aforesaid.' The purpose of the statute is to give a lien to any one who contributes labor, skill, or material in constructing, altering, or repairing a railway, pursuant to and in performance of a contract which the owner has made. And whether one who, instead of undertaking part of the work at a gross price, and doing it through his servants, does it through the same servants, to be paid what it may be worth, is to be deemed a subcontractor, within the meaning of the act, or not, we do not see why he does not perform labor, within its meaning. It would be a very narrow construction to hold that he must perform the labor in person, and that performing it through his servants or teams is not included in the act. If one puts in a hundred days of his servants' work, he contributes to performance of the contract which the owner has made to the same extent as by putting in a hundred days of his personal labor, and he comes equally within the spirit of the act. And it does not matter how many removes he may be from the owner, provided the work be such as the owner contracted for, and he connects himself by mesne contracts with that of the owner.''

Perry et al. v. Murphy et al., 57 N. W. 792-793.

''The action is founded upon Section 6266, Lord's Oregon Laws, which provides as follows:

'' 'Hereafter any person or persons, firm or corporation, entering into a formal contract with the State of Oregon, or any municipality, county, or school district within said state, for the construction

of any buildings, or the prosecution and completion of any work, or for repairs upon any building or work, shall be required before commencing such work, to execute the usual penal bond with good and sufficient sureties, with the additional obligations that such contractor or contractors shall promptlp make payments to all persons supplying him or them with labor or materials for any prosecution of the work provided for in such contracts,' etc.

"The statute was enacted in 1903, and is entitled:

" 'An act to protect subcontractors, materialmen, and laborers furnishing material for doing work upon bublic buildings, structures, superstructures, or other public works.' Laws 1903, p. 256.

"(1) Under the rule of construction, this statute should be read in and become a part of the bond.

"In the case of Multnomah County v. United States Fidelity & Guarnty Co., 87 Or. 198, 170 Pac. 525, L. R. A. 1918C, 685, an action was brought by the county against the defendant, for and on behalf of L. H. McMahan, against the same defendants here for the use of a caterpillar engine which it is alleged that McMahan hired to Sweeney and for the use of which he agreed to pay $10 per day. There, as here, a general demurrer was filed to the complaint and sustained by the trial court upon the theory that the use of the caterpillar engine did not come within the terms of the bond. That ruling was reversed by a decision of this court, written on January 22, 1918, by Mr. Justice Bean.

"(2) The law of that case is vigorously attacked by respondent; but it has been in force and effect for more than one year, and it is a matter of common knowledge that in the ordinary course of business many such bonds have been written in that time, and the decision must have been known and

acted upon at the time of their execution, and that case should now be *stare decisis.*

"The purpose of the act was to protect all persons supplying 'labor or materials for any prosecution of the work provided for in such contract,' and there is much stronger reason for holding that the use of horses comes within the meaning of the word 'labor' as used in the act, than the rental of a caterpillar engine employed on the work. A caterpillar engine' is a machine; a 'horse' is a domestic animal with some degree of intelligence.

"The respondents have cited definitions from Words and Phrases and the New Standard Dictionary as to the meaning of the words 'labor and material' and of the word 'labor,' but Century Dictionary defines the word 'labor' as 'work done by a human being or an animal,' and Words and Phrases, vol. 5, p. 3951, says:

" 'Within the meaning of a statute giving a lien to 'laborers and for persons furnishing materials to contractors or subcontractors,' labor done by a man's team may be fairly regarded as labor done by him, no right arising to any one out of its services except to him'—citing Chicago N. E. R. Co. v. Sturgis, 44 Mich. 538, 541, 7 N. W. 213, 214.

"The opinion in that case says: 'But the labor done by a man's team may be fairly regarded as labor done by him within the meaning of this statute.'

"The same authority also cites the case of Hogan v. Cushing, 49 Wis. 169, 5 N. W. 490, 491, in which the syllabus says: 'The 'labor and services' for which chapter 95 of 1877 gives a lien upon logs are not merely the personal or manual labor and services of the claimant, but include those performed by his teams and servants.'

"(3) If O'Neil in person or through his own employes had used his horses in the 'prosecution of the work,' there would be no question about his right to recover for the joint services of both horses and men. On legal principle, the same rule should apply where he hired out his horses to another to be used and they were so used. We hold that the word 'labor,' within the meaning of the act, should be construed to include the services which the horses performed in the 'prosecution of the work.'

"Judgment is reversed."

Multnomah County v. United States Fidelity & Guaranty Co. et al., 180 Pac. 104-105.

"The claims of Riegelsperger, Joseph Gibson Company, First National Bank of Deer River, Engstrom & Hosford, and Ord Company involve the question of whether one renting or furnishing to the original contractors horses for use in performing the contract may have the benefit of the bond. This question is by no means free from difficulty. McKinnon v. Red River Lbr. Co., 119 Minn. 479, 138 N. W. 781, 42 L. R. A. (N. S.) 872, involved the question whether the labor of teams, hired without drivers, was 'manual labor or other personal services,' so as to come within the log lien law. The decision that there was no lien is not controlling in this case, as the statute and bond use language that is much broader, 'all work and labor performed and all skill, tools, machinery or material furnished.' In Miller v. American Bonding Co. 133 Minn. 336, 158 N. W. 432, we held that there was a liability on the contractor's bond for the repair of tools and machinery necessarily used on the work and for the reasonable value of the use of such tools and machinery. It

may seem doubtful if horses can reasonably called 'tools' or 'machinery,' but, on the other hand, it is impossible to see why the surety should be liable for the repair and use of dinky engines or dump cars used in road construction, and not be liable for the use of teams which do the same work. The horses certainly perform work for the completion of the contract just as the engines and cars do. We have examined the authorities cited by appellant, and are of the opinion that they do not compel us to hold that there is no liability for the use or rental of teams without drivers. All of the cases cited are decided under statutes that are materially different from ours, and are not in accord with our decision in the Miller case. Reference may be made to the notes in 16 L. R. A. (N. S.) 585, 43 L. R. A. (N. S.) 162, and L. R. A. 1915F, 951, where many cases are cited and discussed, also to Eastern Texas R. R. Co. v. Foley, 30 Tex. Civ. App. 129, 69 S. W. 1030, St. L., I. M. & So. Ry. Co. v. Love, 74 Ark. 528, 86 S. W. 395, and Texas & St. L. R. R. Co. v. Allen, 1 White & W. Civ. Cas. Ct. App. Sec. 568.

"Our conclusion, based upon the language of the statute and of the bond, is that the surety is liable for the rental value of horses necessarily used on the work, though the claims did not include the services of teamsters. This would necessarily cover the rental value and cost of repair of harnesses."

Dawson v. Northwestern Const. Co. et al., 163 N. W. 772-777.

The cases cited by the District Court as authority for the proposition that no lien existed in favor of a person furnishing horses, tools, machinery and equipment to any person other than the owner of the land

upon which the structure or improvement is being constructed, have practically no bearing upon the case at bar, for the reason that the statutes under consideration in those cases were more restricted in their scope and application than the Arizona statute under which appellant claims his lien.

Nor are we able to follow the Court in its reasoning that, while a lien might have existed had the contract been made directly with all the owners of the property upon which lien is claimed, such is not the case where contract is made with one of the owners, who had charge or control of the construction of the structure or improvement, with the knowledge and consent of the other owners, and who in making such contract acted for himself individually and as agent for the other owners.

Section 3639, Revised Statutes of Arizona, above quoted, expressly provides that the "person having charge or control of the construction * * * * of any building or other structure or improvement shall be held to be the agent of the owner for the purpose of this chapter." This does not create a general agency by which the owner is personally bound to pay the contract price for labor, machinery, fixtures or tools furnished the contractor to be used in the construction, but does constitute the person in charge or control of the construction the agent of the owner for the purpose of fixing a lien upon the structure or improvement being made. The lien exists, in the language of the statute, "whether said work was done or the articles furnished at the instance of the owner of the building or improvement or his agent" (the person having charge or control of the construction).

The articles of personal property other than horses furnished by the appellant in this case, under his contract, are clearly tools, machinery or fixtures; while the horses furnished under the contract to be used for the purposes set forth in the second amended complaint, in decisions above cited and quoted from, have been held to be tools or machinery within the meaning of a statute giving a lien for tools or machinery used in construction of structures or improvements, and the work performed by them has been held to be "labor" within the meaning of lien statutes.

Had the appellant in this case entered into a contract with the owner or with the person in charge and control of the construction for the excavation of the canals and ditches upon which his horses, tools and machinery were in fact employed, at so much per yard, his right to a lien would have been clear; and the Court should not permit itself to be confused by reason of a contract providing a different basis for payment to the appellant for the reasonable value of the services of his horses and the use of his machinery, tools and equipment. Whatever the form of the contract, the fact remains that the appellant in this case contributed to the construction of structures and improveemnts for which he has not been paid and which have inured to the benefit of the owners thereof. All lien statutes recognize and are enacted for the purpose of enforcing the equitable doctrine that one person should not reap where another has sown.

We respectfully urge that the case should be reversed and remanded with instructions to the District

Court to vacate and set aside decree dismissing second amended complaint as to the defendants Albert Steinfeld, Bettina Steinfeld, Fidelity Savings & Loan Association, and Pima Farms Company, and to overrule their motions to dismiss.

Respectfully submitted,

THOMAS ARMSTRONG, JR.,
ERNEST W. LEWIS,
R. WM. KRAMER,
JAMES R. MOORE,
Solicitors for Appellant.

No. 4040

United States Circuit Court of Appeals
For the Ninth District

T. M. CALDWELL,

Appellant,

vs.

ALBERT STEINFELD, BETTINA STEINFELD, FIDELITY & SAVINGS & LOAN ASSOCIATION, a Corporation, and PIMA FARMS COMPANY, a Corporation, et al.,

Appellees.

BRIEF FOR APPELLEES

SAMUEL L. KINGAN,
JOHN H. CAMPBELL,
ARCHIE R. CONNER,
Solicitors for Appellees.

Filed this ..... day of October, 1923.

.....

Clerk of the United States Circuit Court of Appeals, Ninth Circuit.

Kingan, Campbell & Conner,
46 North Church Street,
Tucson, Arizona.

ACME-TUCSON

No. 4040

United States Circuit Court of Appeals
For the Ninth District

T. M. CALDWELL,

Appellant,

vs.

ALBERT STEINFELD, BETTINA STEINFELD, FIDELITY & SAVINGS & LOAN ASSOCIATION, a Corporation, and PIMA FARMS COMPANY, a Corporation, et al.,

Appellees.

BRIEF FOR APPELLEES

SAMUEL L. KINGAN,
JOHN H. CAMPBELL,
ARCHIE R. CONNER,
Solicitors for Appellees.

Filed this ..... day of October, 1923.

.....

Clerk of the United States Circuit Court of Appeals, Ninth Circuit.

Kingan, Campbell & Conner,
46 North Church Street,
Tucson, Arizona.

ACME-TUCSON

No. 4040

United States Circuit Court of Appeals
For the Ninth District

T. M. CALDWELL,

Appellant,

vs.

ALBERT STEINFELD, BETTINA STEINFELD, FIDELITY & SAVINGS & LOAN ASSOCIATION, a Corporation, and PIMA FARMS COMPANY, a Corporation, et al.,

Appellees.

BRIEF AND ARGUMENT

The plaintiff in the above entitled case claims a lien on certain canals, water ditches and land by virtue of the furnishing of mules and equipment under a written contract between the plaintiff and Edwin Post.

THE STATUTE WHICH GOVERNS APPELLANT'S CLAIM OF LIEN

That section of the Revised Statutes of Arizona, 1913, Civil Code, allowing a lien for the construction,

etc., of any canal, water ditch, etc., reads as follows:

> "Paragraph 3653: All persons who may labor or furnish material of any kind in the construction, alteration or repair of any canal, water ditch, flume or aqueduct or reservoir, bridge, fence or other structure or improvement, and to whom money or wages are due or owing therefor, shall hereafter have a lien upon the same for such sums as are unpaid."

Counsel for appellant contend that paragraph 3639 is the paragraph of the Arizona statutes governing appellant's right to a lien. They set out this paragraph at page 8 of their brief, and for the sake of brevity we will not repeat it here.

In March, 1885, the Legislature of the Territory of Arizona, passed an Act, No. 93, securing liens to mechanics, laborers, and others, which is to be found on page 240 of the Laws of the Territory of Arizona, Thirteenth Legislative Assembly. Said act provided that (in section 1)

> "Every person performing labor upon or furnishing material of the value of $25 or more, to be used in the construction, alteration or repair of any building or other superstruction, railroad, tramway, toll-road, canal, water-ditch, flume, aqueduct or reservoir, building, bridge, fence or any structure or improvement, except property exempt

by law from execution, has a lien upon the same for the work or labor done or material furnished", etc.

Section 1 also provided for a lien for miners. Separate sections gave liens for any person who filled in any lot in an incorporated city or town; any artisan or mechanic who makes, alters or repairs any personal property; any person who performs labor or work on any tract of land by cutting and cording the timber thereon, and to all foundry men and boiler makers for performing work upon machinery, etc.

Under authority of an act of the legislative assembly the governor appointed a commission to revise the laws of the territory. Such commissioners were directed by statute to eliminate "all crude, useless, imperfect and contradictory matter, and insert such new provisions as they might deem necessary and proper."

Accordingly in the Revised Statutes of Arizona, 1887, we find a complete revision of the lien laws relating to mechanics, laborers and others. Par. 2258 of the laws of 1887 is as follows:

"That any person or firm, lumber dealer, artisan or mechanic, who may labor or furnish material, machinery, fixtures or tools to erect any house or improvement, or to alter or repair any building or improvement whatever, shall have a lien on such house, building, fixtures or improvements, and

shall also have a lien on the lot or lots of land necessarily connected therewith, to secure payment for labor done, lumber, material, machinery or fixtures and tools furnished for construction, alteration or repairs."

Par. 2274 related to liens of mechanics, laborers, etc., on railroads; par. 2276 related to liens of miners and laborers upon mines and mining claims; par. 2277 related to liens upon lots in any incorporated city, etc.; par. 2278 related to liens of foundrymen, boiler makers, etc.; par. 2279 related to liens for all persons who cut or cord wood. Par. 2275 reads as follows:

"All persons who may labor or furnish material of any kind in the construction, alteration or repair of any canal, water-ditch, flume or aqueduct or reservoir, bridge, fence or other structure or improvement, and to whom money or wages are due, or owing therefor, shall hereafter have a lien upon the same for such sums as are unpaid."

This paragraph is in the same language and is identical with the language of par. 3653 of the R. S. of 1913, as will be shown from a comparison with par. 3653 heretofore set out.

The next revision of the statutes occurred in 1901 and in the Revised Statutes of that year we find the same arrangement as in the code of 1887. Par. 2258, above set out, appeared in the 1901 statutes as par.

2888 and the only change in said paragraph was in the first line. "That any person, or firm, lumber dealer, artisan or mechanic, who may labor" was changed to read, in the 1901 statutes, to "That any person, firm or corporation who may labor".

Par. 2275 relating to canals, water-ditches, etc., set out above, appeared without the slightest change in the 1901 statutes as par. 2903. The various lien paragraphs mentioned above also appeared in the 1901 statutes as separate paragraphs; none of them were discarded but all appeared in the 1901 statutes.

The next and last revision of the statutes occurred in 1913. In the 1913 statutes we find the paragraph relating to liens on canals, water ditches, etc., appearing as paragraph 3653, and in the same language as it appeared in the codes of 1887 and 1901. The various lien paragraphs mentioned as appearing in the codes of 1887 and 1901 also appeared in the 1913 statutes, as separate paragraphs. The lien paragraphs relating to the lien upon any lot in an incorporated city or town, for every person who furnishes material or labors or fills in or otherwise improves the same; the lien of foundrymen, boiler makers, etc.; the lien in favor of all persons who cut or cord wood, skid logs or pile ties, etc.; and the lien in favor of all persons who may labor or furnish material in the construction, etc., of any canal, water ditch, etc., were all unchanged and the same as they appeared in the code of 1901. The paragraph relating to railroads was the same as it ap-

peared in the statutes of 1901, with the exception that it had a paragraph added thereto.

Par. 2888 of 1901 was slightly amplified and changed by the Code Commissioners and appeared in the 1913 statutes as par. 3639 (being the paragraph which counsel for appellant contend is governing as to appellant's right to a lien), but it was not materially changed and it was not intended to and did not take the place of par. 3653. That such was the case is shown in the fact that the Code Commissioners placed just beneath par. 3639, in the 1913 statutes, as a construction thereof, a citation to the case of *Gates v. Fredericks,* 5 Ariz. 343, 52 Pac. 1118, which was a decision by the Supreme Court of Arizona on par. 2258 of the R. S. of 1887, and by the fact that the language of par. 3639 was not enlarged to incorporate into it or to cover the matters and things contained in par. 3653 and by the fact that par. 3653 was included by the Code Commissioners in the R. S. of Arizona, 1913, and reenacted by the Legislature.

Paragraphs 3653 and 3639 were adopted by the legislature at the same time. In the construction of a particular statute, or in the interpretation of any of its provisions, all acts relating to the same subject, or having the same general purpose, should be read in connection with it, as together constituting one law. In construing acts passed at the same session of the legislature, it is to be presumed that such acts are imbued with the same spirit and actuated by the same

policy and they should be so construed as to harmonize and force and effect should be given to the provisions of each. The legal presumption is that the legislature did not intend to enact contradictory statutes and the statutes should be construed so that both may stand, if possible. These two paragraphs of the Arizona statutes under consideration were enacted at the same time and have remained together as a part of the statutes of Arizona since 1887. Since that time the statutes have been re-enacted twice and each time the two paragraphs under consideration have been re-enacted. The separate lien paragraphs relating to mines, lots, foundrymen, wood cutters, etc., have also been re-enacted during the same period of time, showing clearly the intention of the legislature to retain, as a part of the law, the separate lien paragraphs.

Par. 3639 uses a general term "structure" while par. 3653 refers specifically to "canals, water-ditches, aqueducts, reservoirs," etc. In *United States v. Chase,* 135 U. S. 260, 34 L. Ed. 117, 119, 10 Sup. Ct. Rep. 757, the following rule is stated:

> "It is an old and familiar rule that, 'where there is, in the same statute, a particular enactment, and also a general one, which, in its most comprehensive sense, would include what is embraced in the former, the particular enactment must be operative, and the general enactment must be taken to affect only such cases within the general language as are

not within the provisions of the particular enactment.' * * This rule applies wherever an act contains general provisions and also special ones upon the same subject, which, standing alone, the general provisions would include. Endlich on Interpretation of Statutes, 560."

In order to show how little change was made in par. 2888 of the R. S. of 1901, when it appeared in R. S. of Arizona, 1913, as par. 3639, we will set out par. 2888 of the R. S. of 1901 in full:

"2888. (Sec. 9.) That any person, firm or corporation who may labor or furnish material, machinery, fixtures, or tools to erect any house or improvement, or to alter or repair any building or improvement whatever, shall have a lien on such house, building, fixtures or improvements, and shall also have a lien on the lot or lots or land necessarily connected therewith, to secure payment for labor done, lumber, material, machinery or fixtures and tools furnished for construction, alteration or repairs."

Par. 3639, set forth in appellant's brief at page 8, is as follows:

"Every person, firm or corporation who may labor or furnish materials, machinery, fixtures or tools to be used in the construction, alteration,

erection, repair or completion of any building or other structure or improvement whatever shall have a lien on such house, building, structure or improvements for the work or labor done or materials, machinery, fixtures or tools furnished," etc.

Par. 2888 says "shall have a lien on such house, building, fixtures or improvements" while par. 3639 says "shall have a lien on such house, builidng, structure or improvements", there being only a change of one word in the phrase conferring the lien, the change being from the word "fixtures" to that of "structure". It cannot be argued that by changing "fixtures" to "structure" the Code Commissioners and the legislature intended to repeal par. 3653, and to include in par. 3639, "canal, water-ditch, flume or aqueduct or reservoir, bridge, fence" as set out in par. 3653. Had they desired to include those things set forth in par. 3653 in par. 3639 it seems reasonable to suppose that they would have used language indicating their intention, and not just the word "structure", and would not have retained 3653 as a part of the law.

As par. 3653 has never been expressly repealed, it therefore follows that unless it was impliedly repealed by changing the word "fixtures" to "structure" in par. 3639, it is still in full force and effect. On page 1074 of vol. 36 Cyc, the following appears:

"Between the two acts there must be plain, un-

avoidable, and irreconcilable repugnancy, and even then the old law is repealed only pro tanto, to the extent of the repugnancy. If both acts can, by any reasonable construction, be construed together, both will be sustained."

Par. 3653 relates specifically to canals, water ditches, flumes, aqueducts, reservoirs, etc., and is not in any way inconsistent with or repugnant to par. 3639.

36 Cyc, page 1071, states the following:

"The repeal of statutes by implication is not favored by the courts. The presumption is always against the intention to repeal where express terms are not used. To justify the presumption of an intention to repeal one statute by another, either the two statutes must be irreconcilable, or the intent to effect a repeal must be otherwise clearly expressed. It follows that where the intention not to repeal is apparent or manifest from an act there is no room for repeal by implication, or the application of rules regarding implied repeal."

In 25 Ruling Case Law, page 918, the following appears:

"Repeals by implication are not favored, and will not be indulged if there is any other reasonable construction. The presumption is always against the intention to repeal where express terms

are not used and the implication, in order to be operative, must be necessary."

It is very clear that both paragraphs under consideration are co-existing and do not in any way conflict. As both paragraphs were passed at the same time, it cannot be urged that either paragraph repealed the other. Therefore the lien claimed can only exist, if it exist at all, under and by virtue of par. 3653 of the R. S. of 1913.

Counsel for appellant cite the case of *Mendoza, et al., vs. Central Forest Co.*, 174 Pac. 359, on page 9 of their brief, as showing that an irrigation system is a structure within the meaning of the word as used in par. 3639 of the Arizona statutes. From the few lines quoted by counsel for appellant this might seem to be the case, but upon reading the entire case and the statute under which the lien was claimed, it is apparent that the short quotation by counsel for appellant is misleading. The action in the Mendoza case was under section 1183 of the Code of Civil Procedure of California, which is as follows:

"Mechanics, materialmen, contractors, subcontractors, artisans, architects, machinists, builders, miners, teamsters and draymen, and all persons and laborers of every class performing labor upon, or bestowing skill or other necessary services, or furnishing materials to be used or consumed in or

furnishing appliances, teams and power contributing to the construction, alteration, addition to or repair, either in whole or in part, of any building, wharf, bridge, ditch, flume, aqueduct, well, tunnel, fence, machinery, railroad, wagon road or other structure, shall have a lien upon the property upon which they have bestowed labor or furnished materials, for the value of such labor done and materials furnished and for the value of the use of such appliances, teams or power," etc.

The above quotation was taken from the Mendoza case and was in full force and effect at the time such decision was rendered.

In the Mendoza case we find the following:

"In Williams v. Mountaineer Gold Mining Co., 102 Cal. 134, 34 Pac. 702, 36 Pac. 388, Mr. Justice Temple, speaking for the court, construed these terms as follows:

'The use of the phrase 'other structure' in the above extract (from section 1183) shows that the word 'structure' comprehends all the properties specifically enumerated, and is broad enough to include any *similar* thing constructed, should the enumeration prove incomplete'.

* * * * * * * *

"In the present case, we think, the definition

given by Judge Temple, supra, will lead us to our destination."

The action in the Mendoza case was brought to obtain a lien for farm development, consisting of ditches, drains, etc., some of which, as ditches and roads, were expressly designated as structures in the statute. The others were *similar* things to those enumerated in the statute.

Par. 3639, under which appellant claims, is not as broad as section 1183 of the California statute for it does not provide for liens for "furnishing materials to be used or consumed in or furnishing appliances, teams or power contributing to the construction" etc., of any "ditch, flume, aqueduct," etc., but only provides for a lien for "any building, or other structure or improvement whatever". Section 1183 of the California statutes provides for a lien for miners, and for services performed and materials furnished to railroads, and upon ditches, flumes, aqueducts, etc., whereas such liens are not provided for in section 3639 of the Arizona statutes, such section only providing for a lien upon houses, building and structures; the lien upon a railroad being found in a different paragraph, namely, paragraphs 3651 and 3652 of R. S. of Arizona, 1913, Civil Code; the lien for miners is found in par. 3654 of said Code and the lien upon ditches, flumes, aqueducts, etc., is found in par. 3653 of said Code. It will be seen, therefore, that par. 3639 of the Arizona statu-

tes is very much more restricted than sec. 1183 of the California statutes, and the Mendoza case is not a construction of the word "structure" as used in par. 3639 of the Arizona statutes. In California a statement of all property and things upon which a mechanic's lien may attach is embraced within section 1183 of the Code of Civil Procedure while in Arizona liens upon different kinds of property are divided into various paragraphs. Paragraph 3653, relating specifically to ditches, flumes, aqueducts, reservoirs, etc., is, therefore, the section under which this lien must be asserted.

Appellant in his second amended complaint, in the third paragraph thereof (T. of R. 4) expressly says that certain horses and mules and certain machinery, fixtures and tools were furnished to be used in the construction of canals and water ditches and other works and structures as aforesaid, referring to flumes, culverts, gates, dams, wells, pumps and pumping plants, mentioned in the second paragraph thereof. Counsel for appellant expressly say that whatever was furnished was furnished in the construction, alteration or repair of canals and water ditches, etc., in accordance with the to say that section 3639 has any application to this language of paragraph 3653. How counsel can assume case is difficult for us to perceive.

It would be nothing but a repetiton to argue the matter further. Counsel for appellant seem to admit that the only way they can bind the appellees is to bring this case under section 3639 and it is sufficient to re-

fute this to read the second amended complaint of appellant and read the two paragraphs, to-wit, 3639 and 3653.

APPELLANT HAS NOT PERFORMED LABOR

It is very apparent that in the case at bar there can be no lien for labor performed, by virtue of the leasing of the stock and equipment.

Jones on Liens, (3rd Ed.) Sec. 1361, states the following:

> "But a contractor is not a laborer within the meaning of the statute giving persons liens who perform work and labor, the statute being intended to protect the *actual laborers*, and not applying to contractors or those who only superintend the labor of others."

Little Rock etc. R. Co. v. Spencer, 65 Ark. 183, 194, 47 S. W. 196, 42 L. R. A. 334, was a suit to foreclose a mechanic's lien. The court said in part:

> "A contractor who does not perform any work or labor personally does not come within Sandels & H. Dig. Ark. Sec. 6521, providing a lien for 'every mechanic, builder, lumberman, artisan, workman, laborer, or other person or persons that shall do or perform any work or labor' on a railroad."

In the case of *Wood, Curtis & Co., v. El Dorado Lumber Co. et al.,* 94 Pac., pages 877-878, on page 878, it is stated that the action was brought and the lien claimed under the provisions of Sec. 1183, Code of Civil Procedure of California. This case was decided by the Supreme Court of California on March 13, 1908, and rehearing was denied April 10, 1908. Appellant cites this case and states, on page 11 of his brief, that

> "Under the California statute as it then existed, no lien was given for the furnishing of machinery, fixtures, or tools' to be used in the construction, etc., of any improvement or structure, and the lien was therefore denied."

Appellant, in his brief, at the bottom of page 11, says:

> "From the language of the opinion above quoted, it is quite evident that had the California statute under consideration given a lien for 'machinery, fixtures or tools,' as does the Arizona statute under which plaintiff claims his lien, the Court would have held that the plaintiff in the Wood, Curtis & Company v. El Dorado Lumber Co. case was entitled to a lien upon the railroad for the reasonable value for use of horses and harness furnished the contractor to be used in its construction."

The California statute as it then existed, did, however, give a lien for the furnishing of materials to be

used in the construction, etc., of improvements, etc. Section 1183 of the Code of Civil Procedure of California, as it at that time existed, is as follows:

> "Mechanics, material men, contractors, subcontractors, artisans, architects, machinists, builders, miners, and all persons and laborers of every class performing labor upon or furnishing materials to be used in the construction, alteration, addition to, or repair, either in whole or in part, of any building, wharf, bridge, ditch, flume, aqueduct, well, tunnel, fence, machinery, railroad, wagon road, or other structure, shall have a lien upon the property upon which they have bestowed labor or furnished materials, for the value of such labor done and materials furnished, whether at the instance of the owner, or of any other person acting by his authority or under him, as contractor or otherwise."

In the case above cited the Supreme Court of California said in part:

> "On February 17, 1904, the defendant and appellant herein, the El Dorado Lumber Company, enterd into a contract with the defendants Carney, Roy & Carney for the construction of a single-track railroad, upon a private right of way from North Placerville to its storage yards in El Dorado county. Thereafter, and during the progress of

construction work upon said right of way, the plaintiff corporation let to the firm of Carney, Roy & Carney 53 head of horses, with their harness, at the rate of $10 per month for each horse and harness. An examination of the record shows that these horses were used by Messrs. Carney, Roy & Carney in the course of the construction work, and that the drivers of the horses were hired and paid for by them. * * *

The question, then, which the trial court answered in favor of plaintiff, is: Did plaintiff, by this letting of its horses at a stipulated price per month, 'bestow labor' upon the work, so as to entitle it to a lien under Sec. 1183, Code of Civil Procedure? * * *

The horses ,as horses, were no more entitled to liens than were the harnesses themselves. Each and both together were but convnient appliances for the doing of specific work. In the ultimate analysis there is no difference in principle whether draying is done by horses and wagons, or by automobile trucks; whether grading is done by horses and scrapers or by traction engines and steam peddies. One and all are, in their essence, but tools and machinery. This being so, if the ruling for which respondent contends is the correct one, it must result that if A leases to B a derrick or hoist for use upon the buildings which B is constructing, A will have a lien upon each of those

buildings for the value of the use of the derrick: or, in still simpler form, if a carpenter lets to a fellow carpenter his chest of tools for 50 cents a day, the former will have a lien upon every building upon which the latter works and uses the rented tools. The illustration, reducd to its simplicity, shows the untenableness, if not the absurdity, of the contention. Giving to the law its broadest and most beneficent construction, it can never be said that one who merely rents appliances to another who labors upon a structure has himself bestowed labor upon that structure within the meaning of the law."

This case was decided upon a statute substantially the same as the Arizona statute and which statute gave a lien for both labor and the furnishing of materials. We submit that the ruling in the above quoted case applies equally as strongly to the case at bar.

One letting horses by the month to another to haul timber for a third person is not entitled to a lien upon the lumber for the rental thereof under a statute giving a lien for personal services and for services of a team, upon lumber, as, by such lease, the horses became the lessee's for the time being, and it was he who might have a lien for his services and the use of the horses, and not the owner thereof. *McCullin v. McMullin,* 92 Me. 336, 69 Am. St. Rep. 510, 42 Atl. 500; *Richardson v. Hoxie,* 90 Me. 227, 38 Atl. 142.

One letting horses for use in work of a lienable nature upon logs or lumber is not entitled to a lien for their hire, unless used and worked by him or his servants, under a statute giving a lien upon logs or lumber to any person performing services in cutting, manufacturing, or hauling the same. *Edwards v. H. B. Waite Lumber C.,* 108 Wis. 164, 81 Am. St. Rep. 884, 84 N. W. 150; *Mabie v. Sines,* 92 Mich. 545, 52 N. W. 1007.

One renting teams to a contractor for use in the construction of a railway is not entitled to a lien thereon for their hire, under a statute giving a lien to those performing labor with tools or teams in the construction of a railway, such claim not being within the scope of the statute. *Eastern Texas R. Co. v. Foley,* 30 Tex. Civ. App. 129, 69 S. W. 1030.

Nor is one employed as a superintendent in the construction of a railroad, who furnishes tools and teams for use thereon, entitled to a lien upon the railway for the rental thereof, under a statute giving a lien to mechanics and laborers for labor performed, nothwithstanding the claimant did, at times, use the tools himself, and at other times directed their use by the laborers, as the right to a lien, under the statute, does not extend to work and labor done by others, nor to the use of teams, tools, or implements other than such as are personally used by the claimant. *Texas & St. L. R. Co. v. Allen,* 1 Tex. App. Civ. Cas. (White & W.) 291.

In *Mabie v. Sines,* 92 Mich. 525, 52 N. W. 1007, the court said:

"To hold that the owner of a team let for a stated time, at a stipulated price, may recover even though the one who contracts to and does the work is fully paid, would, we think, be to extend the provisions of the statute beyond their terms or purpose, and would of necessity involve holding that the owner of any machinery or tool leased to the contractor or laborer is entitled to a lien, irrespective of the state of accounts between the owner and such contractor, or between the contractor and the laborer."

In principle, this case is identical with the case at bar.

In the case of *McKinnon v. Red River Lumber Company,* 119 Minn. 479, 138 N. W. 781, 42 L. R. A. (N. S.) 872, decided by the Supreme Court of Minnesota on December 6, 1912, the court said:

"Plaintiffs entered into a written contract with Sibley, by the terms of which they hired and let him have twelve teams of horses at the agreed price of $26 per month for each team. These teams worked for Sibley in hauling and banking the logs he was under contract to haul and bank for defendant. LaPalm, one of the plaintiffs, worked for Sibley in caring for the horses, and drove one of the teams on the work. He was to receive $40 per month for his services, which was paid by defendant. The contractor, Sibley, became insolvent. Plaintiffs, after dmanding payment for

the services of their horses, both of Sibley and of the defendant, filed a lien on the logs for such services. The lien statement, as well as the evidence, shows that the amount claimed was only for the labor of the horses at the contract price, and did not include anything for the personal services of Lapalm, which had been paid for. * * *

The owner of horses, machinery or tools, who leases his equipment to a contractor, certainly does not 'perform manual labor or other personal services for hire' in aid of the cutting, hauling or banking of logs, which the contractor by himself and his servants does under his contract. The contractor has a lien for his own and his employees' labor, and for the use of all instrumentalities, including teams, which are actually used in and necessary to the performance of such labor by the contractor and his employees. Sibley, doubtless, would have a lien upon the logs for his own and his employees' services, including the services of the teams with which they worked. This is the rule of Martin v. Wakefield and Breault v. Archambault, and is also the rule in Wisconsin, Michigan and Maine. But we must hold that the owner of teams or instrumentalities, who leases or hires them to a lumberman or a logger, and who does not, by himself or by his servants, perform manual labor or other services, is not entitled to lien on logs."

In the case of *Lohman v. Peterson et al.*, 87 Wis. 227,

58 N. W. 407, decided by the Supreme Court of Wisconsin, the plaintiff showed, in substance, that he had hired an ox to one Gundersgord for an agreed price; that Gundersgord had a job of hauling railroad ties for the defendants and used the ox in hauling and skidding the ties, and claimed a lien under the statute for the agreed price. The court said:

> "The statute on which the action is founded is Chapter 139, Laws 1891. So much as is involved in the decision is as follows: 'Section 1. Any person who shall do or perform any labor or services in cutting, hauling * * * any logs or timber * * * shall have a lien upon such logs, timber, lumber, cordwood, railroad ties * * * for the amount due or to become due for such labor or services.'
>
> "The evident object of this statute is to secure to such persons as do manual labor upon logs or timber, their pay for their labor. The terms of the statute are, 'Any person who shall do * * * labor or services' shall have a lien. A similar statute has been construed to include, not merely the personal and manual labor of the claimant himself, but also that of his servants, with his teams, Hogan v. Cushing, 49 Wis. 169, 5 N. W. 490. What a man does by another, for many purposes he is said to do by himself. In this case the plaintiff did no manual labor for the defendants,

either personally or by his servant. *It seems like straining the meaning of words to say that he did or performed labor by his ox.* The ox was hired to Gundersgord. It was used by him. For that service it was Gundersgord's team. He had a right to a lien upon the same ties for his services, including the services of that team. Kelley v. Kelley, 77 Me. 135. It was hired to him with no reference to this particular work, but generally. Its time was hired at an agreed price per day, for all the time it was kept by Gundersgord, whether it worked or not. The evidence does not show how much work the plaintiff's ox did on defendants' ties. The claim is not made with reference to that fact, but with reference to the time it was absent from the plaintiff's home. It is held that the plaintiff's evidence failed to show that the plaintiff had done or performed labor or services on the defendant's railroad ties, within the meaning of the statute."

The case of *Hogan v. O'Neill et al.*, 5 N. W. 494-495, cited by appellant on page 12 of his brief, merely holds that the lien claimant had a lien for his servants and teams. The labor of the teams was accompanied by the manual labor of the servants, which makes that case entirely different from the case now before the court.

Appellant, on page 13 of his brief, cited the case of *Chicago & N. E. R. v. Sturgis*, 7 N. W. 213, and stated

> "it was held that the owner of horses was entitled to a lien for the reasonable value of services performed by them under contract of hiring."

An examination of this case discloses the fact that the plaintiff also labored, as well as his horses. The rule seems to be well settled that where a claimant himself labors he is entitled to include the value of services performed by his servants and his teams. This is such a case. In this case the court said:

> "The 'protection' provided for is confined to 'laborers for and persons furnishing materials to contractors or sub-contractors.' A distinction is clearly marked between those who contract for labor and materials and the persons who actually perform labor and actually furnish materials."

As the appellant in the case at bar merely contracted to furnish stock and equipment to another person, who, in turn, could use them, and the appellant and his servants or agents did not perform any labor in connection therewith, it seems clear that, under the above rule, he would not be entitled to a lien.

And in the next case cited by appellant, that of *Perry et al. v. Murphy et al.*, 57 N. W. 792, we find the same situation exists. The lien claimant not only furnished teams, but performed manual labor through his servants. The cases cited by appellant are cases where manual labor was performed by the lien claimant or his

agents in connection with the labor of teams. In no case has a lien ever been allowed for the labor of teams alone, hired without drivers or teamsters. The cases cited by appellant and above referred to are all cases where the labor of the teams was accompanied by personal and manual labor of the lien claimant, his servants or agents, and, therefore, are entirely different from the case at bar, where the contract of leasing was of teams alone and no personal or manual labor was performed by the lien claimant or his agents or servants.

APPELLANT DID NOT FURNISH MATERIALS

There can be no lien for the plaintiff in this case for materials furnihed. The mere using of wagons, etc., that had been leased for no particular purpose, did not convert them into "material" for the construction of any canal, water ditch, etc.

The word "material," according to Webster, imports the substance of which anything is made. "Material" according to Bouv. Law Dictionary, "includes everything of which anything is made."

In the case of *McAuliffe v. Jorgenson et al.*, 82 N. W. 706, 707, 107 Wis 132, decided by the Supreme Court of Wisconsin, the facts were that the plaintiff endeavored to establish a lien upon certain land for the money due him for the use of well-boring machine hired by said plaintiff to the contractor. The lien was sought to

be established under sections of the Revised Statutes of Wisconsin (3314-3315) giving a lien for "work and labor" performed and "materials" furnished in constructing a well. The court said:

> "Plaintiff has no lien unless it is given him by virtue of sections 3314, 3315, Rev. St. 1898. The former section provides in substance, that every person who, as principal contractor, performs any work or labor or furnishes any material in digging or constructing any well shall have a lien upon the interest of the owner in the land upon which the same is situated, not exceeding one acre, if within the limits of a city. Section 3315 provides substantially that every person who, as subcontractor of the principal contractor, performs any work or labor, or furnishes any materials to the parties named in the preceding section, shall have the lien and remedy provided by that chapter, upon performing certain conditions, which it is admitted were performed in this case. Plaintiff's right to a lien is based upon the fact that he hired his well-boring machine to Jorgenson, who had the contract to bore the well. Laws giving liens to mechanics are equitable in their character, and are to be liberally construed to advance their objects; yet they are purely statutory and cannot be extended by construction to cases not fairly and reasonably within their purview. It will be observed that the statute speaks of 'work and labor' performed or

'material' furnished. Under no permissible theory can it be said that the plaintiff has furnished any 'materials' that entered into or became a component part of the well. Whatever right he has, if any, arises from the use of his machine. When he hired it to Jorgenson, to all intents and purposes it became the latter's machine, the same as if he had purchased it outright. The plaintiff did no manual labor, either by himself or his servants, toward the construction of the well. The machine was used by Jorgenson as though it was his own. For its use in connection with his labors he would have been entitled to a lien; not for the use of the machine alone, but because with his labors in the use and operation of the machine the well was drilled. The machine thus used is 'the plant of the contractor' and can in no sense be said to be materials furnished or used in the drilling of the well. Basshor v. Railroad Co., 65 Md. 99, 3 Atl. 285. To permit this lien to stand and be enforced would be stretching the lien law beyond any reasonable limit."

In the case of *Gilbert Hunt Co. v. Perry*, 110 Pac. 541, the Supreme Court of the State of Washington said (1910):

"This is an action to foreclose a lien claimed by the plaintiff upon the buildings, structures, ditches, etc., constituting the power and irrigation plant of

the Pasco Power & Water Company, and also upon several thousand acres of land of that company proposed to be irrigated by the plant. A trial before the court resulted in a judgment of foreclosure and an order for the sale of the property to satisfy the plaintiff's claim. The defendant has appealed.

"The Pasco Power & Water Company is a domestic corporation engaged in a general scheme and enterprise in the county of Walla Walla along the Snake river, having for its purpose the irrigation of several thousand acres of land, and the building of irrigation ditches and pumping plants, all as a part of one general scheme for the improvement of its land. Between February 5 and November 9, 1907, the appellant furnished to the Pasco Power & Water Company a large number of articles, expended money in paying freight and cartage thereon to the place of delivery, and performed other services in connection with the furnishing and delivery of the articles, all of which we will assume entered into the cost thereof. * * *

"These articles were all furnished and accepted for the purpose of being used by the Pasco Power & Water Company in connection with the construction of the buildings, structures, ditches, etc, upon its land. A careful reading of all the evidence convinces us, however, that these articles were not furnished with the understanding or intent that all

of them were to be used in the construction of the structures or ditches when completed; but that they were furnished with the understanding that they were to be used in connection with such construction, at least for the most part, only as tools and appliances to carry on such construction. The list of items so furnished, with the charge for each, shown by an exhibit in the record, admitted to be correct, covers many typewritten pages. There are, among others, such items as horse shoe nails, hammers, straps for steam shovel, blacksmith's coal, dump car trucks, rental for engine, curry combs, horse brushes, slides for donkey engine, truck axles, tar, draw heads and springs therefor, car wheels, lathe work on axles, blacksmith's work on axles, drills, putting on car wheels, brass part for steam shovel, cylinder oil, saw blades, saw set, tongs, wrenches, cup grease, files, powdered emery and emery cloth, boxes for dump cars, packing, oil can, brake shoes, and freight charges on such articles. It is quite plain from the record that these items, to which others might be added by closely scrutinizing the list, were not furnished to be used in, and were not used in, the buildings, structures, or ditches; but were furnished to be used and were used as tools and appliances or as repairs thereto, with which the work of constructing the plant was carried on. * * *

"The provisions of section 1129, Rem. & Bal.

Code, under which this claim of lien is made, so far as we need notice that section here, reads: 'Every person performing labor upon or furnishing material to be used in the construction, alteration, or repair of any * * * building * * * ditch * * * or any other structure * * * has a lien upon the same for the labor performed or the material furnished.' * * *

"In the case of Armore & Co. v. Western Construction Co., 36 Wash. 529, 538, 78 Pac. 1106, 1107, Judge Dunbar, for the court, said: 'Under the lien laws, generally, "material" is deemed to be something that goes into, and becomes a part of, the finished structure, such as lumber, nails, glass, hardware, and a thousand other things that might be mentioned, which are necessary to the complete creation of a building or structure.' And in Tsutakawa v. Kumamoto, 53 Wash. 231, 235, 101 Pac. 869, 871, the same view was expressed by Judge Chadwick, speaking for the court, as follows: 'The object of these statutes is to secure a lien to the laborer and materialman for that which goes into the finished structure.' Articles furnished for use merely as tools and appliances, in carrying on the work of construction, are not lienable. Vendome Turkish Bath Co. v. Schettler, 2 Wash. St. 457, 27 Pac. 76; Hall v. Cowen, 51 Wash. 295, 98 Pac. 670; Potter Mfg. Co. v. Myer & Co., 171 Ind. 513, 86 N. E. 837, 131 Am. St. Rep. 267; Rinzel v.

Stumpf, 116 Wis. 287, 93 N. W. 36; Allen v. Elwert, 29 Or. 428, 44 Pac. 823; Meistrell v. Reach, 56 Mo. App. 243; Basshor v. Baltimore & O. R. Co., 65 Md. 99, 3 Atl. 285; Bender-Moss on Mechanics' Liens and Building Contracts, Sec. 89; 27 Cyc. 38, 45."

This case was decided under a statute with the same provisions, substantially, as to water ditches, structures, etc., as the Arizona statutes contain, and is in point with the case at bar. We think it clear that appellant has merely furnished tools and appliances for carrying on the work of construction, and, therefore, has not brought himself within the provisions of the statutes giving liens in certain cases.

In the case of *Hall v. Cowen,* 97 Pac. 670, the Supreme Court of Washington, on Dec. 26, 1908, said:

"The defendant Cowen, as owner of certain lots in one of the additions to the city of Seattle, employed the defendants Wagner & Harney to clear, grade and fill in certain streets adjacent thereto. The contractor hired or rented five wheel scrapers from the plaintiffs to be used in and about the work of grading and filling in the streets. Thereafter the plaintiff filed a lien against the lots owned by the defendant Cowen for the sum of $112.50 for the rental and hire of the scrapers, and this action was instituted against the contractors and the

owner of the property to recover the amount of the lien claim against the contractors, and to foreclose the lien against the abutting property. * * * The lien was claimed under section 5902, Ballinger's Ann. Codes & St. (Pierce's Code, Sec. 6104), which reads as follows: 'Any person who, at the request of the owner of any real property, his agent, contractor, or sub-contractor, clears, grades, fills in or otherwise improves the same, or any street or road in front of or adjoining the same, has lien upon such real property for the labor performed, or the material furnished for such purposes.' It seems to us too plain to admit of extended argument or discussion that a claim for the rental of scrapers is neither for labor performed or materials furnished within the purview of this section. Allen v. Elwert, 29 Or. 443, 44 Pac. 823, 48 Pac. 54; McCormick v. Los Angeles W. Co., 40 Cal. 185."

In the case of *Troy Public Works Company v. The City of Yonkers et al.,* decided by the New York Court of Appeals, 1912, the court said:

"This is an action brought to foreclose a mechanic's lien. The only question to be decided is whether the plaintiff is entitled to a lien for the rent of a steam shovel which it leased to a contractor. * * * The steam shovel in the case at bar did not go into the work as material. It was a machine used on the work, not by the owner, but

by his lessee, and it was returned to the owner just as it was received, necessary wear and tear excepted. It was not material, either according to the definition of the lexicographers, or under the decisions in other states where they have lien statutes similar to our own. Material means 'matter which is intended to be used in the creation of a mechanical structure' (2 Bouvier's Law Dict. Rawle's Rev. 341), or 'the substance matter of which anything is made' (Webster). It does not mean the machinery that may be used in the manufacture of materials, for it might as well be said 'that the mill by which lumber is sawed, or the tools used by the mechanic in building a house, are materials furnished in the construction * * * as to say that the machinery used in the manufacture of the artificial stone is to be considered as part of the materials used in the construction of the masonry work.' Basshor v. Baltimore & O. R. Co., 65 Md. 103, 3 Atl. 286. A similar view was expressed in a case where the wooden molds for concrete blocks were returned to the owner after the completion of the work. These were characterized as instrumentalities 'used in shaping the concrete of which the interior walls of the building were constructed, and no more entered into the actual construction of the building than did derricks, tackle, engines or any other mechanical appliance which may have been used in its construction, and, after the completion

> of the building, removed as the property of the contractor owning and operating them.' Builders' Material Co. v. Johnson, 158 Ill. App. 411. The same result has been reached by the courts of other states where lien laws have been filed for labor, instead of materials, by lessors of machines who themselves contributed no labor to the structures upon which the machines were used."

We think the above case is in point with the case at bar and completely answers the claim and argument of appellant that he is entitled to a lien, in the negative.

In Indiana, under a statute which gave a right to a lien for the use of machinery in the erection of structures, the lessor filed a lien for the use of a "trench machine" which was operated exclusively by the lessee and his employees. The Supreme Court of Indiana, in speaking of the lienor's claim, said that it was

> "not for the value of the work actually done, but compensation at an agreed price for a specified time as the rental value of the machine, without regard to whether it was idle or in use upon this work,"

and held that the lessor was not entitled to a lien. *Potter Mfg. Co. v. Myer*, 171 Ind. 517, 131 Am. St. Rep. 267, 86 N. E. 838.

Neither is one entitled to a lien for the rental of horses for such purpose, under a statute giving a lien to one who shall 'furnish any materials, machinery, fix-

tures, or any other things toward the building, construction or equipment of any railroad,' the hire of teams not falling within the terms of such statute. *St. Louis, I. M. & S. R. Co. v. Love,* 74 Ark. 528, 86 S. W. 395.

APPELLANT IS NOT ENTITLED TO LIEN UNDER EITHER OF THE STATUTES IN QUESTION

Appellant is not entitled to a lien under par. 3653 or 3639 for the reason that the mules and equipment were not furnished to the owners of the lands, canals, water-ditches, etc., upon which a lien is sought to be established, but were furnished to Edwin R. Post, acting in his individual capacity.

Judge Dooling, the trial judge, had cited to him, at the argument of the motions to dismiss, paragraphs 3653-3639, and appellant's second amended complaint. He sustained the motions to dismiss the second amended complaint because it did not state facts sufficient to constitute a cause of action, and made a statement in so doing that is more pat than our argument, in which he says that there is no averment as to who owned the property at the time the contract sued upon was entered into, that is to say, the contract sued upon by appellant, and that the contract makes no mention of where, or for what purpose, the property thus furnished was to be used. We quote from Judge Dooling's opinion and order sustaining motions to dismiss appellant's second amended complaint, as follows:

"Whatever may be the rule where horses and equipment are furnished by their owner directly to the owner of the property to be improved, it seems to be settled that where they are furnished by the owner to a third party, who in turn uses them in the improvement of the property of another, if there be any lien existing at all, such lien exists in favor of the third party, who stands in the place of the owner by reason of his contract of hiring. McMullin v. McMullin, 42 Atl. 500; Richardson v. Hoxie, 38 Atl. 142; Edwards v. Lumber Co., 84 N. W. 150; Mabie v. Sines, 52 N. W. 1007; McKinnon v. Lumber Co., 138 N. W. 781; Lohman v. Peterson, 58 N. W. 407; McAuliffe v. Jorgenson, 82 N. W. 706, and Potter Co. v. Myer, 86 N. E. 838." (T. of R. 22.)

Jones on Liens (3rd Ed.), Sec. 1235, page 424, says:

"A contract, express or implied, of the owner of this land is necessary to the establishment of a mechanics' lien upon it. The lien, however, is created, not by the contract, but by furnishing the materials or doing the work under the contract. Yet a contract creating an indebtedness on the part of the person whose property is to be charged with a lien must exist in the first place, and then the performing of labor or the furnishing of materials under the contract creates the lien."

In this case the contract itself shows that appellant

contracted with Edwin R. Post, and not with the owners of the land, the lease reading as follows:

> "THIS AGREEMENT, made and entered into this 16th day of October, 1919, by and between T. M. Caldwell, of Phoenix, Arizona, as party of the first part, and E. R. POST, of Tucson, Arizona, as party of the second part" (T. of R. p. 5),

and is signed as follows:

> "T. M. CALDWELL
> EDWIN POST." (T. of R. p. 9.)

The supplemental contract reads as follows:

> "THIS AGREEMENT, made and entered into this first day of April, 1920, by and between T. M. Caldwell, of Phoenix, Arizona, as party of the first part, and Edwin R. Post, of Tucson, Arizona, as party of the second part" T. of R. p. 10),

and is signed as follows:

> "T. M. CALDWELL
> EDWIN R. POST" (T. of R. p. 11).

Ruling Case Law, Vol. 18, page 894, after declaring that it is essential that a contract be made, states:

> "Such contract need not be in writing, but it must be made with the owner or his duly authorized agent, though this does not mean necessarily the owner of the fee, but one whose interest or

> estate in the property to be charged is such that a lien may attach to it."

Any lien that appellant might have would, therefore, only attach to any possible interest that Edwin R. Post might have in the land upon which a lien is sought to be established.

In the case of *Breman v. Foreman,* 1 Ariz., 413, Foreman and Jackson were at the time in possession of land under agreement for a deed thereto from J. Collingwood & Co., the absolute owners of the same, and material was furnished to said Foreman and Jackson. Foreman and Jackson failed to comply with the terms of the agreement for a deed, never became the owners of the land, and went out of possession of the property. The lower court decreed a sale of the whole premises under a suit for foreclosure of a mechanic's lien for the furnishing of the material aforesaid. The Supreme Court of Arizona, on appeal, held that only the *interest of the party who caused the building to be erected or the materials furnishd* can be ordered sold for the extinguishment of the lien.

Jones on Liens (3rd Ed.) Sec. 1247, says:

> "One in possession of land under a verbal or written contract to purchase cannot subject to a mechanic's lien either the building or the land, to prejudice of the legal owner, without his consent, even under a statute which contemplates a remedy

either against the building or the land. The lien of the mechanic or material man in such case must be measured by the extent of the equity of the purchaser under the executory contract. * * *

* * * Though no purchase is ever made by the contractor, and the premises with the improvements revert to the owner, the latter is not, by his acceptance, use and enjoyment of the improvements, estopped to deny that he made or authorized the contract for placing them upon his land."

Sec. 1248. "One having merely a contract for the purchase of land cannot subject the freehold to a mechanic's lien, although he subsequently, after the completion of the work for which a lien is claimed, takes a conveyance of the fee in pursuance of the contract. To create a valid lien, the person whose agreement or consent is necessary for that purpose must, at the time of such agreement or consent, have the capacity to confer that right."

Sec. 1253. "In general, it may be said that the owner's consent cannot be implied from his knowledge that improvements are in process of construction which would give rise to a lien if they were made with his authority or consent. Knowledge on the part of the owner that another, without authority, has made a contract for the erection of a building, and that under such contract the building is approaching completion, is not sufficient to

bind the owner or his property. Thus, if a husband, on his own responsibility, contracts for the building of a house upon his wife's estate, her mere silence or failure to dissent from the contract does not make the contract binding upon her.

"Mere knowledge of the owner that a laborer is working upon the building does not amount to a consent which entitles the laborer to a lien. Consent within the meaning of the statute is held to mean something more than acquiescence. It implies an agreement to that which could not exist without such consent."

In Boisot on Mechanics' Liens, at Section 124, the following appears:

"In making improvements on land, a mechanic or material man must take notice of the interest and title in the premises of the person with whom he contracts, as shown by public record, as his lien, as a general rule, attaches only to such interest."

We think this case comes fairly within the rule laid down by the trial judge, namely, that no lien can be acquired where horses and equipment are not furnished by their owner to the owner of the property to be improved, but are furnished by the owner to a third person, who in turn uses them to improve the property of another. These horses and equipment were furnished to Post, who in turn used them on the property of the

defendants. The right to a lien, if any there be, would exist in favor of the person or contractor doing the work, and the appellant is not entitled to a lien on the property of the defendants, for any unpaid balance due him from Post. This is true, regardless of the paragraph of the Arizona statutes under which the lien is claimed. Even though par. 3639 applies to this claim of lien, as contended by counsel for appellant, appellant is not entitled to a lien, as he did not furnish the horses and equipment to the owners of the property to be improved, as appears from the facts set forth in the complaint, notwithstanding appellant's conclusion that the same were furnished to the owners.

MULES AND EQUIPMENT WERE NOT FURNISHED BY APPELLANT FOR THE PARTICULAR PURPOSE NAMED IN THE STATUTE

In order to acquire a mechanic's lien on property, it is necessary that the party performing labor or furnishing maetrials must contract with reference to the particular property upon which he later seeks to establish a lien. It is not sufficient to show that the mules and equipment furnished to Post were used in the construction of canals, water-ditches, etc., on the land of the defendants, it must be alleged and proved that the mules and equipment were furnished, by the express terms of the contract, to be used for the particular purpose of construction, alteration or repair of any canal, water-ditch, etc., upon the land of the defendants and were in fact so used.

The contract in this case is a lease dated October 16, 1919, which does not in any way state the purpose or use to which the leased animals and equipments were to be put. The lease did not state any specified time during which the stock was to be available to the party of the second part, and, accordingly, on the first day of April, 1920, a further and supplemental agreement was entered into by the same parties, which recited,

> "WHEREAS, the agreement above referred to did not state any specified time during which this stock shall be available for use by party of the second part and whereas the party of the second part desires to continue the use of this stock until the first of June, 1920, and for a longer period provided party of the second part has other work which it is desired to use this stock for."

(T. of R. p. 10.) * * *

> "First: That the party of the first part will rent to the party of the second part, under the same terms and conditions as are embodied in the agreement of October 16, 1919, the stock and equipment now in the possession of the party of the second part until the first of June, and for such longer period as may be necessary to complete the construction work remaining to be done on that portion of the Santa Cruz Valley Farms project lying south and east of the syphon crossing of the Santa

Cruz River, a short distance from Rillito."

(T. of R. p. 10.)

This supplemental agreement was merely to provide a time for the termination of the lease and did not impose upon the party of the second part the duty of using the stock and equipment in any particular place or for any particular purpose.

Had the party of the second part used the stock and equipment leased to him in grading streets or filling in city lots, there is no clause in the contract which would enable the party of the first part to restrain him from so doing. The contract of leasing, on page 5 of T. of R. says:

> "1. That the said party of the first part does hereby let the use and deliver possession f. o. b. the cars at Phoenix, Maricopa County, Arizona, to the said party of the second part, and the said party of the second part does hereby hire the use and shall receive possession f. o. b. the cars at Phoenix aforesaid from the said party of the first part,"

and on page 7 of T. of R., in the fifth paragraph of the first lease, we find the following:

> "said party of the second part shall re-deliver said property to said party of the first part in as good condition as when delivered and received, and such

> re-delivery shall be made on cars at nearest shipping point by said party of the second part if said first party so requests."

The lease provides where the party of the second part shall receive the leased stock and equipment and where he shall return them and the supplemental agreement provides the time during which they shall be available to him, leaving him free to make such use of them while they are in his possession as he shall desire. In fact, the supplemental agreement expressly provides that he may make such use of the stock and equipment as he desires and shows that the parties to the lease had in contemplation, at the time the supplemental agreement was executed, the fact that the party of the second part would desire to use the stock and equipment for various kinds of work. The supplemental agreement states, at page 10 of the T. of R., the following:

> "and whereas the party of the second part desires to continue the use of this stock until the first of June, 1920, and for a longer period provided party of the second part has other work *which it is desired to use this stock for,*"

The phrase "which it is desired to use this stock for" leaves it to the discretion of the party of the second part as to what work he shall use the stock for.

There is nothing in said lease or the supplement thereof which provides for the

> "furnishing of the labor of certain horses and mules, and of certain machinery, fixtures and tools to be used in the construction of said canals and water ditches and other works and structures as aforesaid,"

as alleged in paragraph III of appellant's second amended complaint. (T. of R. p. 4.)

In no place in the lease or supplement thereof is there any reference to canals, water ditches, etc., nor is there any reference to any kind of work on which the property shall be used.

The first agreement was entered into on October 16, 1919, and the supplement agreement was entered into a long time thereafter, to-wit, on April 1st, 1920, and only a short time before the termination of the lease, on July 19, 1920 (T. of R. p. 12), and in no wise changed or affected the right of the party of the second part to use the stock and equipment leased, for any purpose that he so desired.

Under the leases hereinbefore referred to, there was nothing to prevent Edwin R. Post from using the horses, mules and equipment to build highway in Pima County or for any other purpose for which they were suited. The lease did not contemplate the use of such stock and equipment on the Post Project in the construction of ditches and canals. The fact that such horses, mules and material were used on the Post Project in the construction of canals, ditches, etc., did not

operate to give the lessors a lien on such canals, ditches, etc., as such use was not provided for in the lease. The plaintiff herein could not have restrained Edwin R. Post from using the leased stock and equipment in building highways, if Post had decided to use the stock and equipment for that purpose. In order to acquire a lien under the statute for labor performed or materials furnished for the construction, alteration or repair of any canal, water ditch, flume, etc., the party furnishing such material or performing such labor must furnish the material or perform the labor for the *special purpose named in the statute.*

Jones on Liens (3rd Ed.) sec. 1327, states:

> " * * * The allegation and the proof must be that the materials were *furnished to be used* and *were used* in the building upon the premises against which it is sought to enforce the lien. * * * It is the furnishing of the materials under a contract, with the *intention and understanding that it shall be used* in erecting the building that creates the lien."

In Cyclopedia of Law and Procedure, vol. 27, page 376, it is stated:

> "Plaintiff's pleading must show by proper allegations that the materials for which the lien is claimed were furnished to be used in the construc-

tion of the building upon which the lien is claimed, and it is not sufficient to state that such material actually entered into and became a part of the building."

Jones on Liens (3rd Ed.), sec. 1326, page 553, states:

"Materials must be furnished with special reference to their *use in a particular building* in order to secure the protection of a mechanic's lien law."

Ruling Case Law, vol. 18, page 992, sec. 52, states:

"The mechanics' lien law contemplates a contract or agreement more specific than an ordinary sale of materials. It should be understood between the parties that the materials are to be used in the erection or repair of a building or the making of an improvement. If a materialman sells his materials without any understanding as to their application, he can assert no lien upon the building upon which they may be used, as he relies exclusively upon the credit of the buyer and takes no security. The lien is acquired, therefore, only when the materials are furnished with an understanding that they are to be used for a purpose named in the statute, and not when they are supplied under an ordinary sale on credit, though the buyer may actually use them in a building or improvement."

In the case of *Choteau v. Thompson,* 2 Ohio, St. 114, 126, the court said:

> "If a material-man sells his wares with no understanding, express or implied, as to their application, he can assert no lien upon the building or vessel in which they may be placed. He trusts to the responsibility of the buyer alone and takes no security. He sells, *not for the special purpose named in the statute* of 'constructing, altering, or repairing' but for *any purpose that may seem best to the buyer.* But it is only where the materials are furnished for a purpose named in the act that a lien is acquired."

The reasoning in the case just cited applies just as forcibly to the case at bar, where the lease leaves the lessee free to use the stock and equipment for any purpose that he may desire. There is nothing in the lease by which the lessor could require the lessee to use the stock for any particular purpose, or by which he could prevent the lessee from using the stock and equipment for any purpose for which the property is suited.

In the case of *Burkhart et al. v. Reisig,* 24 Ill. 530, the court said:

> "No lot on which a lien could attach, is mentioned in the contract. There is no element of a lien disclosed in the case, and it is not, in any sense, within the statute."

"The mechanics' lien law provides, that any person who shall, by contract with the owner of any piece of land or town lot, furnish labor or materials for erecting or repairing any building, or the appurtenances of any building, on such land or lot, shall have a lien upon the whole tract of land or town lot, in the manner herein provided, for the amount due to him for such labor or materials.

(Scates' Comp. 156).

"* * * By the contract, the engine could be set up on any lot in Chicago. We understand the intention of the law is, that the contract must have reference to some *particular tract of land or town lot,* in order that the lien may take effect."

In the case of *Genest v. Las Vegas Masonic Bldg. Assn. et al,* 11 N. M. 251, 67 Pac. 743, it was held that where materials are *furnished to be used,* and *in fact are used,* in the construction of a particular building in New Mexico, the party so furnishing such material is entitled to the benefit of the lien laws of New Mexico, the court saying:

"It is the furnishing of materials *to be used in the construction* and the putting of them into the building which entitles the subcontractor to the lien upon the premises to the value of the material."

We also cite the following cases which hold that at

the time the contract is made the parties furnishing labor or materials must contract with reference to the particular property upon which a lien is later sought to be created. In this case it is apparent that the stock and equipment leased by appellant was not furnished for any particular purpose. The lease is in writing and speaks for itself.

"One is entitled to no lien on a lot and building for materials furnished the contractors before he knew that they were to be used in the building." Cook v. Rome Brick Co., 98 Ala. 409, 12 South. 918.

"When materials are sold under a general sale, without any reference to what use or when they are to be used, the seller is not entitled to a mechanic's lien therefor." Colorado Iron Works v. Riekenberg, 43 Pac. 681.

"In order to entitle a material man to a lien the material must be furnished for the house on which the lien is claimed." Current River Lumber Co. v. Cravens, 54 Mo. App. 216.

"To entitle a material man to enforce a lien upon a building for material furnished, it must not only be alleged and proved that the materials have been used in the construction of the building, but that they have been, *by the express terms of the contract,* furnished for the particular building on

which the lien is claimed." Haughton v. Blake, 5 Cal. 240.

"To entitle a material man to enforce a lien upon a building for material furnished, it must not only be alleged and proved that the materials have been used in the construction of the building, but that they have been, *by the express terms of the contract,* furnished to be used in the building." Holmes v. Richet, 56 Cal. 307, 38 A. Rep. 54.

"There is no lien in the case of lumber furnished on general account without reference to its use in any particular building." Hill v. Bishop, 25 Ill. 349, 79 Am. Dec. 333.

"To create a lien for materials against a building, the materials must be furnished for the particular building in which they were used, and on which the lien is claimed. Hill v. Braden, 54 Ind. 72; Hill v. Ryan, Id. 118; Talbott v. Goddard, 55 Ind. 496.

"To entitle a material man to a lien on a build ing for materials furnished, he must show that they were furnished for the particular building on which he seeks to obtain the lien." Hill v. Sloan, 59 Ind. 181.

"If work be done or materials furnished, *without a contract* that they shall be put to the *particular* use of erecting, altering, or repairing a craft

or building, no lien can be asserted on the building or vessel in which they may be placed." Choteau v. Thompson, 2 Ohio St. 114.

Section 1183 of the Code of Civil Procedure of California, hereinafter set out, provides for lien for labor bestowed or materials furnished. In a suit to enforce a lien under that section, in the case of *Roebling Sons Co. v. Bear Valley Irrigation Co. et al.,* the Supreme Court of California said in part:

> "In order to enforce the lien of a material man against a building or structure, 'the materials must not only have been used in the construction of the building, but they must have been, by the *express terms of the contract,* furnished for the *particular building* on which the lien is claimed'. Bottomly v. Rector, 2 Cal. 92; Houghton v. Blake, 5 Cal. 240; Holmes v. Richet, 56 Cal. 307; Cohn v. Wright, 89 Cal. 86, 26 Pac. Rep. 643."

Clearly, there can be no assertion that the stock and equipment were furnished, by the agreement of October 16, 1919, for the particular purpose of the statute, namely, to be used in the construction, etc., of canals, water ditches, etc. The supplemental agreement was entered into on the 1st day of April, 1920, and the lease was terminated on the 19th day of July, 1920, (T. of R. p. 12), only three months and nineteen days after the supplemental agreement was made, and being made, as

stated therein, for the purpose of fixing the time during which the stock and equipment should be available to the party of the second part, did not change the original agreement in any way whatsoever.

APPELLANT HAS NOT COMPLIED WITH THAT PART OF CONTRACT RELATING TO PURCHASE OF LAND BY HIM

In our argument that the second amended complaint of appellant does not state facts sufficient to constitute a cause of action, we call your Honors' attention to the second paragraph of the lease of October 16, 1919, appearing on page 6 of the T. of R. It is as follows:

> "The party of the first part shall purchase of the party of the second part not less than forty (40) acres of the land comprising the enterprise of the party of the second part; such land being either that certain 50 acre tract known and described as ————————, and which has been heretofore examined and designated as preferable by the first party; or any other 40 acre tract in said project remaining unsold by October 20th, 1919, and which the party of the first part may select on or before October 20th, 1919, the price of the tract being $150.00 per acre, with good and perfect title and accompanied by the Valley Farms Water Co. contract in the form now used for water contracts for water for said project, and the regularly printed

forms of the party of the second part shall be used in the matter of the purchase, sale and conveyance of and the water respecting such land."

Appellant agreed to purchase from the party of the second part forty acres of land at $150.00 per acre, amounting to a total of $6,000.00. Appellant alleges that the reasonable and agreed rental value of the stock and equipment was the sum of $9,692.55; that there has been paid on said sum the sum of $4,341.50, leaving a balance due appellant of $5,351.05. (T. of R. p. 12.)

Appellant does not state that he has not purchased the forty acres of land at $150.00 an acre. A man is presumed to fulfill his lawful contracts, and as far as the record shows appellant has received his forty acres of land and is not entitled to any further sum. Appellant is bound by the lease and contract, and shows no right of action in his second amended complaint, as he does not show that he was prevented from purchasing the land by the party of the second part, if in fact he was so prevented. It was clearly the intention of the parties to the contract that the party of the first part should take land from the party of the second part as part of the agreed rental for the stock and equipment of the party of the first part. The contract must be construed as a whole, and although the agreement of the party of the first part to purchase the land is a separate covenant, the contract undoubtedly would not have been entered into had the party of the first part not agreed to take part of his rental for the stock and

equipment in land. Appellant must allege either performance on his part of his covenant to purchase the forty acres of land or a sufficient excuse for non-performance. This he has not done. Appellant is bound by the stipulation or covenant in the contract that he "shall purchase of the party of the second part not less than forty acres of land," at $150.00 an acre, amounting to $6,000.00 and is presumed to have done so. As appellant only claims a balance due of $5,351.05, and the purchase price of the land is $6,000.00, his second amended complaint does not show that he is entitled to any further sums of money. If plaintiff intends to rely on an excuse for not performing, whatever it may be, the particular facts and circumstances constituting such excuse should be averred. Appellant has neither alleged performance on his part of, or an excuse for not performing, the covenant to purchase forty acres of land at $150.00 an acre from the party of the second part, and we therefore insist that the second amended complaint of appellant does not state facts sufficient to constitute a cause of action.

SUITS ON SURETY BONDS NOT APPLICABLE TO THIS CASE

Counsel for appellant, beginning at the bottom of page 14 of their brief, quote at great length from the case of *Multnomah County v. United States Fidelity and Guaranty Co. et al.*, 180 Pac. 104-105.

The case is a suit upon a certain penal bond, exe-

cuted by the Pacific Bridge Company as principal and United States Fidelity & Guaranty Company, as surety, to Multnomah County.

The bond was given under the provisions of section 6266, Lord's Oregon Laws. This bond and statute are construed, as stated in the above entitled case, in an opinion written by Mr. Justice Bean, in the case of *Multnomah County v. United States Fidelity & Guaranty Co.*, 87 Or. 189, 170 Pac. 525, L. R. A. 1918C, 685.

In the last mentioned case the complaint stated that Multnomah County entered into a contract with the defendant Pacific Bridge Company for the improvement of a portion of Columbia River highway. The Pacific Bridge Company commenced the construction of the improvement, and during the course thereof entered into an agreement with T. A. Sweeney for the grading of the highway. In performing this work he used a caterpillar engine which he hired from L. H. McMahan, whom he promised to pay the sum of $10.00 per day for the use thereof. A balance of $420.00 was unpaid for the use and repair of the catterpillar engine.

The construction company filed a bond with the county in accordance with the contract and section 6266, L. O. L., with the defendant United States Fidelity & Guaranty Company as surety. After reciting the contract between Multnomah county and the Pacific Bridge Company, the bond provides:

"Now, therefore, if the said principal herein

* * * shall faithfully and truly observe and comply with the terms, conditions, and provisions of the said contract, in all respects, and shall well and truly and fully do and perform all and singular the covenants, conditions, guaranties, matters, and things by it agreed, covenanted, and undertaken to be performed under said contract, plans, and specifications, upon the terms proposed therein. * * * and shall indemnify and save harmless the county of Multnomah, * * * and shall promptly pay all laborers, mechanics, subcontractors, and materialmen, and all persons who shall supply such laborers, mechanics, or subcontractors, with materials, supplies, or provisions for carrying on such work, all just debts, dues, and demands incurred in the performance of such work, * * * then this obligation to be void; otherwise to remain in full force and effect."

The court said in part:

"The position taken by the defendants is that the payment for the use of the caterpillar engine is not provided for in the contract and bond under the terms of the statute. In the expression of the statute it is quite likely that the lawmakers, to a certain extent, had in contemplation the various lien statutes providing for liens on buildings and other property, both real and personal, for labor and materials. However, the enactment under considera-

tion has a different purport and broader meaning than the ordinary lien statutes; therefore the construction of the latter affords but little assistance in arriving at the intent of the former. The lien statutes have usually been strictly held to cover only what is incorporated into the building or property against which the lien is claimed. Take for instance our mechanic's lien statute (L. O. L. Sec. 7416) which provides in part that 'a person performing labor upon or furnishing material, or transporting or hauling any material of any kind to be used in the construction, alteration, or repair, either in whole or in part, of any building' shall have a lien upon the same. Such lien statutes obviously cover only what goes into the building or structure and adds to the value of the same. * * *

"In the present case the act and bond are susceptible of a more liberal construction than the lien statutes. Under the law and the plain language of the bond all indebtedness incurred for labor and material used in the prosecution of the work contracted to be performed is thereby protected. * * *

"According to the strict legal definition of the term 'labor and material' the use of the engine would not be embraced therein. 2 Words and Phrases, Second Series, p. 1321."

The ruling in this suit on contract and bond has no application to the case at bar. As shown by the re-

marks of Mr. Justice Bean in his opinion, it is susceptible of a more liberal construction than the lien statutes. Mr. Justice Bean states in substance that if the above suit were upon the lien statutes, no lien would be allowed.

The next and last case cited by appellant, on page 17 of his brief, is the case of *Dawson v. Northwestern Const. Co. et al.,* 163 N. W. 772-777. This is also a suit on a surety company bond and is, therefore, one of a different line of cases entirely from the mechanic's and materialmen's lien cases. We desire to quote from the case itself to show what the conditions of the bond sued on were and to show how much broader the bond is than the lien statutes of Arizona. The court said in part:

> "This brings us to a consideration of the merits of the respective claims, as to whether they are such as are entitled to the benefit of the bond. Under G. S. 1913, Sec. 8245, the bond is required to be given:
>
> > 'For the use of the obligee and of all persons doing work or furnishing skill, tools, machinery, or materials under, or for the purpose of, such contract, conditioned for the payment, as they become due, of all just claims for such work, tools, machinery, skill and materials, for the completion of the contract in accordance with its terms, for saving the obligee harmless from all

costs and charges that may accrue on account of the doing of the work specified.'

The bond by its terms was 'for the use of the county, and also for the use of all persons who may perform any work or labor, or furnish any skill or material in the execution of the contract', etc. The words 'tools' is not employed in this 'use' clause, but does appear in the condition of the bond, which is that the obligor shall pay, as they become due, 'all just claims for all work and labor performed and all skill, tools, and material furnished under or for the purpose of or in the execution of said contract,' etc. In view of the quoted language of the condition clause, it must be held that one furnishing 'tools' for the work is entitled to the benefit of the bond. Sepp v. McCann, 47 Minn 364, 50 N. W. 246.

The claims of Riegelsperger, Joseph Gibson Company, First National Bank of Deer River, Engstrom & Hosford, and Ord Company involve the question of whether one renting or furnishing to the original contractors horses for use in performing the contract may have the benefit of the bond. This question is by no means free from difficulty. McKinnon vs. Red River Lbr. Co., 119 Minn. 479, 138 N. W. 781, 42 L. R. A. (N. S.) 872, involved the question whether the labor of teams, hired without drivers, was 'manual labor or

other personal service' so as to come within the log lien law. The decision that there was no lien is not controlling in this case, as the statute and bond use language that is *much broader,"*

The case above quoted, in which the bond covered "skill", "tools" and "for saving the obligee harmless from all costs and charges that may accrue on account of the doing of the work specified" is entirely different from the Arizona lien statutes and can have no application whatsoever.

On July 18th, 1919, Hon. Samuel L. Pattee, Judge of the Superior Court of the State of Arizona, in and for the County of Pima, decided the case of United States Fidelity & Guaranty Company vs. T. J. Shea, et al. An appeal was never taken in this case to the Supreme Court of Arizona and it will not, therefore, be found in the reports, but it is such an important case that I desire to briefly quote from Judge Pattee's opinion.

The defendant Shea entered into a written contract with the superintendent of streets of the City of Tucson for the construction of a sewer in said city. This contract was made under the provisions of what is known as the Improvement Act of 1912, being Chapter XIII, of Title 7, Revised Statutes of Arizona, 1913, and amendments thereto.

"At the time of entering into this contract Shea

gave the bonds, one in the sum of $18,405, conditioned for the faithful performance of the contract and the other in the sum of $36,810 conditioned as follows: 'Now, therefore, if the said contractor (Shea) or any of its assigns fail to pay for any material furnished for the said improvement or for any work or labor done thereon of any kind, the said surety will pay the same to an amount not exceeding the sum hereinabove specified. This bond shall inure to the benefit of any and all persons, companies or corporations who perform labor on or furnish materials to be used in the said work or improvement as provided in the Improvement Act of 1912 and subsequent amendments.' These bonds ran to the City of Tucson as obligee and were given in accordance with Paragraph 1962, Revised Statutes, 1913. * * *

Suit was brought on the surety bond and McLean & Walsh, among others, filed a claim against the surety company on the bond given. Their claim was for a trench digging machine furnished Shea for use in digging the sewer. In this connection Judge Pattee said in part:

"The case comes therefore to the question whether the rental of the trenching machine, including the freight charge in that term, is allowable in what is in effect a suit upon the bond. In other words, is such a charge one for labor or materials

furnished within the meaning of the statute and bond? The evidence shows that the machine was actually used in the digging of trenches in which to lay the sewer under the Northside contract. The work done by it was an essential part of the work to be done by Shea under that contract. This question has been presented to the courts in a number of cases and has resulted in a variety of absolutely conflicting decisions, sometimes based upon the peculiar language of particular statutes and sometimes taking a diametrically opposite view as to the meaning of identical language used in statutes. The best considered and, so far as the court is advised, the latest decision against the right to recover such a claim is Southern Surety Company vs. Municipal Excavating Company, 160 Pac. 617, a decision of the Supreme Court of Oklahoma. The claim in that case, like this, was for the rental of trenching machines. The condition of the bond in that case, as in this, was for the payment of labor and material furnished. The court reviews and comments upon a large number of authorities and reaches the conclusion that the rental of such a machine is not labor or material within the meaning of the bond. This case was decided in July, 1916, and perhaps at that time the preponderance of authority was with the view taken by the court. Later cases in other states, however, present a different view of the question. In the earlier cases

the tendency of the courts was to apply the rules obtaining in mechanics lien cases. It has always been the settled rule that public property is not subject to a lien on behalf of one furnishing labor or material, and the origin of statutory provisions providing for the giving of the bond to secure the payment of the claims of those furnishing labor or material may have been the necessity for making some provision to fill the office usually performed with respect to private property by a statute giving a mechanics' or materialman's lien. And this thought permeates apparently many of the decisions and furnishes the reason for the particular holdings made by many courts. So, treating the statute as in effect a substitute for the mechanic's lien privilege, the courts were prone to apply the same rules with respect to lienable and nonlienable material and what constituted labor or material as in cases arising under mechanic's lien statutes. The later decisions, however, have treated the right created by statute requiring the giving of a bond and the rights of action upon the bond as being something entirely different and independent of any statute relating to mechanic's liens, and have given such statutes and the terms used in them, such as 'labor', 'material' or 'supplies', a *much more broad and liberal meaning than would be given to like statutes relating to mechanic's liens.*"

The above case shows the difference between the

lien statute cases and surety bond cases.

In *Sherman vs. American Surety Co.,* 173 Pac. 161, a decision of the Supreme Court of California, the bond was conditioned for the payment of materials and supplies. It was held that a charge for rental and transportation of tools were materials or supplies within the conditions of the bond. In this case the distinction is stated between statutes giving mechanic's liens and statutes requiring the giving of bonds and the reasons for a more liberal construction of the latter are explained at some length.

The cases allowing recoveries on surety bonds for public works are an entirely different line of cases from the mechanic's and materialmen's lien cases and have, therefore, no application to the case at bar.

IF ONLY PART OF THE CLAIM IS LIENABLE THE ENTIRE CLAIM SHOULD BE DISALLOWED

If the court should decide that some of the articles are covered by the lien of the statute and some are not, and the court is unable to determine with certainty what are and what are not lienable items, the entire claim should be disallowed. In the case of *Gilbert Hunt Company v. Parry,* 110 Pac. 541, hereinbefore cited, the court said in part:

> "It may be conceded that where some single non-lienable item or even several are mistakenly in-

cluded in a claim of lien, and such items can be readily segregated from those which are lienable, that such fact will not necessarily destroy claimant's right of lien; but when the commingling occurs in such manner that the court is unable to determine with certainty what are and what are not lienable items in the claim made, then the rule seems to be that the entire claim of lien is of no effect. It does not appear to us that this case presents situation where there can be a segregation and preserve respondent's lien right, like in the case of Bellingham v. Linck, 53 Wash. 208, 101 Pac. 843, and cases there cited. The general rule is stated in Bender-Moss on Mechanics' Liens and Building Contracts, sec. 377, as follows: 'When an unspecified and undeterminable portion of the materials mentioned in the claim consists of non-lienable items which cannot be segregated from the general aggregate the claim is of no effect.' "

The cases cited by appellant have been cases where the labor of teams was coupled with manual labor of the claimant or his servants, or a suit upon a surety bond. The cases cited are, therefore, entirely different from the case at bar and the reasoning in such cases has no bearing upon the question of whether or not a lien exists in this case.

We think the cases we have cited show conclusively that no lien exists in this case. It is obvious that the

relation of lessor and lessee is the only one that existed between the owner and the user of the stock and equipment leased. No contract was made by the owner of the land with appellant; no labor was performed by appellant or his agents or servants in connection with the use of the stock and equipment leased; the stock and equipment was not furnished by appellant for the purpose of being used upon the particular land upon which a lien is claimed; the stock and equipment furnished under the lease did not go into the finished structure but were merely furnished for use as tools and appliances for use in carrying on construction work, and the furnishing of stock and equipment for carrying on construction work is neither performing labor or furnishing material within the meaning of the lien statutes of Arizona. Clearly, the appellant herein has not brought himself within the provisions of the lien statutes of Arizona, giving and granting liens in certain cases.

We respectfully urge that the action of the District Court in sustaining the motions of the defendants to dismiss the second amended complaint be affirmed.

SAMUEL L. KINGAN,
JOHN H. CAMPBELL,
ARCHIE R. CONNER,
Solicitors for Appellees.

No. 4011

United States
Circuit Court of Appeals
For the Ninth Circuit.

P. PIACENZA,

Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court, for the Southern District of California, Southern Division.

Parker, Stone & Baird Co., Law Printers, 232 New High St., Los Angeles.

FILED
MAY 9 1913
F. D. MONCKTON
CLERK

No.

United States
Circuit Court of Appeals
For the Ninth Circuit.

P. PIACENZA,

Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court, for the Southern District of California, Southern Division.

Parker, Stone & Baird Co., Law Printers, 232 New High St., Los Angeles.

INDEX.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

PAGE

Assignment of Errors 32
Bail Bond and Bond for Costs 37
Bill of Exceptions 28
Testimony on Behalf of Plaintiff:
Ragon, Antone R. 30
Clerk's Certificate to Judgment Roll 12
Clerk's Certificate to Judgment Roll 20
Citation 2
Information 5
Motion in Arrest of Judgment 21
Motion to Set Aside and Vacate Judgment 23
Minutes 8
Minutes 12
Names and Addresses of Attorneys 1
Notice of Hearing of Motions 25
Order Allowing Writ of Error 35
Petition for Writ of Error 34
Praecipe 41
Stipulation Extending Time, Etc. 26
Verdict 15
Writ of Error 3

Names and Addresses of Attorneys:

For Plaintiff in Error:

THEODORE GOTTSDANKER, Esq.,
Equitable Bank Building, Los Angeles, California.

For Defendant in Error:

JOSEPH C. BURKE, Esq.,
United States Attorney, and
MACK MEADER,
Assistant United States Attorney.

United States of America, ss.

To The United States of America and Joseph C. Burke, United States Attorney, Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit of Appeals for the Ninth Circuit, to be held at the City of San Francisco, in the State of California, on the 26th day of May, A. D. 1923, pursuant to a writ of error filed in the Clerk's Office of the District Court of the United States, in and for the Southern District of California, in that certain cause wherein you are defendant in error and P. Piacenza is plaintiff in error to show cause, if any there be, why the judgment rendered against the plaintiff in error, P. Piacenza, in the writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable BENJAMIN F. BLEDSOE United States District Judge for the Southern District of California, this 26th day of April, A. D. 1923, and of the Independence of the United States, the one hundred and forty-seventh.

Bledsoe

U. S. District Judge for the Southern District of California.

Service of a copy of the within writ is hereby acknowledged this 26th day of April 1923.

Joseph C. Burke

Joseph C. Burke, U. S. Atty.

3948 Crim IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT P Piacenza, Plaintiff in Error vs. The United States of America, Defendant in Error Citation FILED APR 26 1923 CHAS. N. WILLIAMS, Clerk By R S Zimmerman Deputy C L R B 8/84

United States of America, ss.

The President of the United States of America,

To the Judges of the District Court of the United States, for the Southern District of California, GREETING:

Because in the record and proceedings, and also in the rendition of the judgment of a plea which is in the said District Court, before you between P. Piacenza, plaintiff in error and The United States of America, defendant in error a manifest error hath happened, to the great damage of the said P. Piacenza, plaintiff in error as by his complaint appears, and it being fit, that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at the City of San Francisco, in the State of California, on the 26th day of May next, in the said United States Circuit Court of Appeals, to be there and then held, that the record and

proceedings aforesaid be inspected, the said United States Circuit Court of Appeals may cause further to be done therein to correct that error, what of right and according to the law and custom of the United States should be done.

WITNESS, the HON WILLIAM HOWARD TAFT, Chief Justice of the United States, this 26th day of April in the year of our Lord one thousand nine hundred and twenty three and of the Independence of the United States the one hundred and forty seventh

[Seal] CHAS. N. WILLIAMS

Clerk of the District Court of the United States of America, in and for the Southern District of California.

By R S Zimmerman,
Deputy Clerk.

The above writ of error is hereby allowed.

Bledsoe
Judge.

I hereby certify that a copy of the within Writ of Error was on the 26th day of April, 1923, lodged in the office of the Clerk of the said United States District Court, for the Southern District of California, Southern Division, for said Defendants in Error.

CHAS N WILLIAMS

Clerk of the District Court of the United States for the Southern District of California.

By R S Zimmerman
Deputy Clerk.

3948 United States Circuit Court of Appeals for the NINTH CIRCUIT P. Piacenza Plaintiff in Error

vs. The United States of America Defendant in Error Writ of Error FILED APR 26 1923 CHAS. N. WILLIAMS, Clerk By R S Zimmerman Deputy

Form No. 689.

In the DISTRICT Court of the United States, For the SOUTHERN District of CALIFORNIA
SOUTHERN DIVISION

THE UNITED STATES
vs.
P. PIACENZA and FRANK MORETTI,
.....
.....

INFORMATION. VIOLATING SECTION 21 & 25 Title II of the National Prohibition Act of October 28, 1919

UNITED STATES OF AMERICA,
SOUTHERN DISTRICT OF CALIFORNIA } ss:

Be it Remembered, That JOSEPH C. BURKE the Attorney of the United States for the Southern District of California who prosecutes in behalf and with the authority of the United States, comes here in person into Court at this January Term thereof, and for the United States gives the Court to understand and be informed that one P. PIACENZA and FRANK MORETTI, whose full and true names are other than as herein stated, are to affiant unknown, late of the Southern Division of the Southern District of California, heretofore, to wit: on or about the 29th day of November, 1921, at Belvidere, County of Los

Angeles, within said division and district, and within the jurisdiction of the United States and this Honorable Court, did knowingly, wilfully and unlawfully maintain a common nuisance, to-wit: a room, building and place on Riverside Street, Belvidere, County of Los Angeles, where intoxicating liquors then and there containing alcohol in excess of one half of one percent by volume, were manufactured, kept, sold and bartered for beverage purposes; in violation of Section 21, Title II of the National Prohibition Act of October 28, 1919.

Contrary to the form of the statute in such case made and provided and against the peace and dignity of the said United States.

SECOND COUNT.

And the said Joseph C. Burke, who prosecutes for the United States as aforesaid, does further give the Court to understand and be informed:

That P. PIACENZA and FRANK MORETTI, whose full and true names are other than as herein stated, to affiant unknown, late of the Southern Division of the Southern District of California, heretofore, to wit: on or about the 29th day of November, 1921, at Belvidere, County of Los Angeles, within said division and district, and within the jurisdiction of the United States and this Honorable Court, did knowingly, wilfully and unlawfully have in their possession certain property and apparatus designed for the manufacture of intoxicating liquor for beverage purposes containing alcohol in excess of one half of one percent, to wit: two stills, 50 gallons mash destroyed, five

gallons moonshine and tools; in violation of Section 25, Title II of the National Prohibition Act of October 28, 1919.

contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

Whereupon, the said United States Attorney for the District aforesaid prays the consideration of this Court here in the premises, and that due process of law may be awarded against the said P. PIACENZA and FRANK MORETTI defendants, in this behalf to make their answer to the United States touching and concerning the premises.

Dated at Los Angeles, this 29th day of March, A. D. 1922.

Joseph C. Burke
United States Attorney for the Southern District of California

Mark L. Herron
Assistant United States Attorney.

UNITED STATES OF AMERICA SOUTHERN DISTRICT OF CALIFORNIA ss:

I, D. J. O'Leary Federal Prohibition Agent, for the Southern District of California, being sworn, do say that the foregoing information is true in substance and in fact.

D J O'Leary

Subscribed and sworn to before me this 29 day of March, A. D. 1922.

[Seal] Chas N Williams,
Clerk U. S. District Court Southern District of California.

By Edmund L Smith Deputy

[Endorsed]: No. 3948 U. S. DISTRICT COURT SOUTHERN District of CALIFORNIA SOUTHERN DIVISION. THE UNITED STATES vs. P. PIACENZA and FRANK MORETTI. INFORMATION For Vio. Sec. 21 & 25 Title II of the National Prohibition Act of October 28, 1919. FILED MAR 29 1922 CHAS. N. WILLIAMS, Clerk By Louis J. Somers Deputy

At a stated term, to wit, the January Term, A. D. 1922, of the District Court of the United States, within and for the Southern Division of the Southern District of California, held at the court room thereof, in the city of Los Angeles, on Wednesday, the 29th day of March, in the year of our Lord one thousand nine hundred and twenty two.

PRESENT: THE HONORABLE Oscar A. Trippet, DISTRICT JUDGE.

United States of America, Plaintiff	)	
vs.	)	No. 3948 Crim. S. D
P. Piacenza and Frank Moretti Defendants	)	

Mark L. Herron, Esq., Assistant U. S. Attorney, appearing as counsel for the Government, having presented a verified Information in this cause; now, upon motion of said Mark L. Herron, Esq., it is by the court ordered that said Information be filed and that the bail of each defendant herein be fixed in the sum of $1000.00.

At a stated term, to wit, the January Term, A. D. 1922, of the District Court of the United States, within and for the Southern Division of the Southern District of California, held at the court room thereof, in the City of Los Angeles, on Monday, the 10th day of April, in the year of our Lord one thousand nine hundred and twenty-two.

PRESENT: THE HONORABLE OSCAR A. TRIPPET, District Judge.

United States of America, Plaintiff	)	
vs.	)	No. 3948 Crim. S. D
P. Piacenza and Frank Moretti Defendants	)	

This cause coming on at this time for arraignment and Plea of defendant P. Piacenza; Mark L. Herron, Esq., Assistant U. S. Attorney, appearing as counsel for the Government; defendant P. Piacenza being present in court with his attorney, A. E. T. Chapman, Esq., and defendant having been arraigned, thereupon states his name to be as given in the Information and waives the reading thereof; and, upon being required to plead, having interposed his plea of Not Guilty, it is by the court ordered that this cause be continued to May 23rd, 1922, for the trial of said defendant P. Piacenza and that this cause be continued to April 17th, 1922, for arraignment and plea of defendant Frank Moretti.

At a stated term, to wit, the January Term, A. D. 1922, of the District Court of the United States, within and for the Southern Division of the Southern District of California, held at the court room thereof, in the City of Los Angeles, on Friday, the 21st day of April, in the year of our Lord one thousand nine hundred and twenty-two.

PRESENT: THE HONORABLE Oscar A. Trippet, DISTRICT JUDGE.

United States of America, Plaintiff	)	
vs.	)	No. 3948 Crim. S. D.
Frank Moretti, Defendant	)	

Upon ex parte motion of Mark L. Herron, Esq., Assistant U. S. Attorney, appearing as counsel for the Government, it is by the court ordered that this cause be and the same is hereby dismissed, as to defendant Moretti.

4/21/501

At a stated term, to wit, the January Term, A. D. 1922, of the District Court of the United States, within and for the Southern Division of the Southern District of California, held at the court room thereof, in the city of Los Angeles, on Monday, the 1st day of May in the year of our Lord one thousand nine hundred and twenty two.

PRESENT: THE HONORABLE OSCAR A. TRIPPET, DISTRICT JUDGE.

United States of America,)
Plaintiff)
vs.) No. 3948 Crim. S. D.
)
Frank Moretti, Defendant)

This cause coming on at this time for arraignment and plea of defendant Frank Moretti; now, upon motion of Mark L. Herron, Esq., Assistant U. S. Attorney, appearing as counsel for the Government, it is by the court ordered that this cause as to defendant Frank Moretti be and the same is hereby dismissed.

IN THE DISTRICT COURT OF THE UNITED STATES, IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION.

United States of America,)
Plaintiff)
vs.) No. 3948 Crim. S. D.
)
P. Piazenza, et al. Defendants)

I, CHAS. N. WILLIAMS, Clerk of the District Court of the United States for the Southern District of California, do hereby certify the foregoing to be a full, true and correct copy of an original JUDGMENT entered in the above entitled cause; and I do further certify that the papers hereto annexed constitute the JUDGMENT ROLL in said cause.

ATTEST MY HAND AND SEAL of said District Court this 5 day of May A. D. 1922.

[SEAL] CHAS. N. WILLIAMS, Clerk,

BY: Louis J. Somers, Deputy Clerk

[Endorsed]:
No. 3948 Cr. In the District Court OF THE UNITED STATES for the Southern District of California Southern Division. United States of America, vs. P. Piazena, et al. JUDGMENT ROLL. Filed May 5 1922 Chas. N. Williams, Clerk By Louis J. Somers, Deputy Clerk. Recorded Min Book No. 43, 501; 44 page 37.

At a stated term, to wit: the January Term, A. D. 1923 of the District Court of the United States of America, within and for the Southern Division of the Southern District of California, held at the court room thereof, in the City of Los Angeles, on Tuesday the 13th day of March, in the year of our Lord one thousand nine hundred and twenty-three.

PRESENT: The Honorable BENJAMIN F. BLEDSOE, District Judge.

UNITED STATES OF AMERICA, Plaintiff,	)	
vs.	)	No. 3948 Crim. S. D.
P. Piacenza, Defendant.	)	

This cause coming on at this time for trial of defendant P. Piacenza before this court and a jury to be impanelled herein; Mack Meader, Esq. and Mark L. Herron, Esq. Assistant United States Attorneys, appearing as counsel for the Government; defendant being present in court with his attorney A. E. T. Chapman, Esq.; L. Vaillancourt being also present in his official capacity as stenographic reporter of the testimony and proceedings, and counsel for the respec-

tive parties having announced their readiness to proceed with the trial of this cause, it is by the court ordered that this cause be proceeded with, and that a jury be impanelled herein, and thereupon the following twelve names were drawn from the jury box, to wit:

Thomas M. Campbell; Ray R. Thomas; Geo. Esmay; Ray Mitchell; Lee Chamberlain; Lewis R. McKesson; Henry W. Whitmarsh; Chas. P. Curran; Geo. W. Ritchey; Wm. F. Goble; Perce H. Curtis; and Elbert Bell, and said petit jurors having been called and sworn on voir dire and examined by the court and by counsel for the defendant for cause and passed for cause; and

Lewis R. McKesson having been peremptorily challenged by counsel for the defendant and by the court excused;

It is by the court ordered that the name of one more petit juror be drawn from the jury box, said juryman being Warren A. Lanz and said Warren A. Lanz having been called and sworn on voir dire and passed for cause by the court, it is by the court ordered that the petit jurors now in the box be sworn in a body as the jury to try this cause, said petit jurors as sworn being as follows, to wit:

THE JURY.

1. Thomas M. Campbell
2. Ray R. Thomas
3. Geo. Esmay
4. Ray Mitchell
5. Lee Chamberlain
6. Warren A. Lanz
7. Henry W. Whitmarsh
8. Chas. P. Curran
9. Geo. W. Ritchey
10. Wm. F. Goble
11. Perce H. Curtis
12. Elbert Bell

Now, at the hour of 11:12 o'clock A. M. the court declares a recess in this cause to the hour of three o'clock P. M., and

At the hour of 3:40 o'clock P. M. the court having reconvened and all being present as before; and

Anton R. Ragon having been called, sworn and having testified in behalf of the Government; and

In connection with his testimony there having been offered and admitted in evidence on behalf of the Government the following exhibits, to wit:

U. S. Ex. No. 1 - Galvanized iron still and can containing coil
U. S. Ex. No. 2 - Small copper still
U. S. Ex. No. 3 - Large copper still
U. S. Ex. No. 4 - Five gallon bottle containing liquor
U. S. Ex. No. 5 - Large funnel
U. S. Ex. No. 6 - Galvanized iron bucket containing hose, etc.

and

Wm. Y. Ballinger having been called, sworn and having testified in behalf of the Government; and cross examined by Attorney Chapman on behalf of the defendant; and

D. J. O'Leary having been called, sworn and having testified on behalf of the Government and cross examined by said A. E. T. Chapman, Esq. on behalf of the defendant; and

The Government having rested; and

The motion of said A. E. T. Chapman, Esq. for an

instructed verdict of not guilty to the charge of manufacturing liquor having been denied; and

P. Piacenza having been called, sworn and having testified in his own behalf;

At the hour of 4:30 o'clock P. M. the court declares a recess in this cause to the hour of ten o'clock A. M. March 14, 1923.

At a stated term, to wit: the January Term, A. D. 1923 of the District Court of the United States of America, within and for the Southern Division of the Southern District of California, held at the court room thereof, in the City of Los Angeles on Wednesday, the 14th day of March, in the year of our Lord one thousand nine hundred and twenty-three.

PRESENT: THE HONORABLE BENJAMIN F. BLEDSOE, District Judge.

UNITED STATES OF AMERICA, Plaintiff,	)	
vs.	)	No. 3948 Crim. S. D.
P. Piacenza, Defendant.	)	

This cause coming on at this time for further trial of defendant herein before this court and a jury heretofore impanelled; Mack Meader, Esq., Assistant United States Attorney, appearing as counsel for the Government; defendant P. Piacenza being absent from court, and his attorney A. E. T. Chapman, Esq. being present; J. B. Faulkner being also present in his official capacity as stenographic reporter of the testimony and proceedings, it is by the court ordered at the

hour of ten twenty o'clock A. M., the jury being present, that a recess be taken for ten minutes; and

At the hour of ten-thirty o'clock A. M. the court having reconvened and all being present as before and defendant being present, and counsel for the respective parties having announced their readiness to proceed with the trial of this cause, it is by the court ordered that this cause be proceeded with, and

Defendant having resumed the witness stand and cross examined by Mack Meader, Esq. on behalf of the Government, and re-directly examined by A. E. T. Chapman, Esq. on behalf of the defendant and defendant having been examined by the court,

The defendant rests; and

Anton R. Ragon having been recalled to the witness stand in rebuttal and having testified on behalf of the Government; cross examined by Attorney Chapman and examined by the jurors; and

Wm. Y. Ballinger having been recalled to the witness stand and having testified for the Government and cross-examined by A. E. T. Chapman, Esq., on behalf of the defendant and examined by the jurors; and

D. J. O'Leary having been recalled to the witness stand and having testified for the Government and cross-examined by A. E. T. Chapman, Esq.; and

The Government having rested; and

Defendant having thereupon been recalled to the witness stand in his own behalf; and

At the hour of 11:30 o'clock A. M. the defendant having rested and the Government having rested; and

Mack Meader, Esq. having thereupon argued on behalf of the Government to the jury; and

At the hour of 11:35 o'clock A. M., A. E. T. Chapman Esq. having argued to the jury on behalf of the defendant; and

At the hour of 11:45 o'clock A. M. Mack Meader, Esq. having argued in rebuttal on behalf of the Government to the jury; and

The court having thereupon instructed the jury with respect to the law involved in this cause, the defendant's instructions refused by the court having been filed herein; and

At the hour of 12:05 o'clock P. M. Bailiff Henry Yonkin having been sworn to care for the jury during the deliberation of their verdict and the jury having thereupon retired to deliberate upon their verdict;

Now, at the hour of 12:15 o'clock P. M. the jury return into court and are asked if they have agreed upon a verdict, and the jury having replied that they have so agreed, are required to present the same, said verdict as presented and read by the clerk of the court being as follows, to wit:

> IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION, United States of America, Plaintiff vs. P. Piacenza and Frank Moretti, Defendants, No. 3948 Crim. S. D. We, the jury in the above entitled cause, find the defendant P. Piacenza guilty as charged in the first count of the Information and guilty as charged

in the second count of the Information. Los Angeles, California, March 14, 1923. Ray Thomas, Foreman.

and the verdict of guilty against defendant P. Piacenza having been presented and read as aforesaid, and ordered filed and entered herein, and defendant having interposed no legal excuse why judgment should not be pronounced at this time, the court pronounces sentence upon defendant P. Piacenza for the offence of which he stands convicted, namely, violation of the National Prohibition Act of October 28, 1919, and it is the judgment of the court that defendant P. Piacenza stand committed to the Orange County Jail for the term and period of ten (10) months on the first count and pay unto the United States of America a fine in the sum of one dollar on the second count; and, upon motion of said A. E. T. Chapman, Esq. defendant P. Piacenza is granted a five day stay of execution of sentence; and it is further ordered by the court on motion of Mack Meader, Esq. that the liquor and apparatus seized herein be turned over to the United States Marshal and by the said Marshal be destroyed.
48/169-170

You are instructed that evidence of circumstances must all concur to show that the defendant *comitted* the crime, and such circumstances must all be inconsist*a*nt with any other rational conclusion than that the defendant is guilty, and must exclude, to a moral certainty, and to your entire satisfaction, the theory of innocence; and if the circumstances and evidence in this case can by you be reasonably be construed con-

sistently with the innocence of the defendant, it is your duty so to construe them and to acquit the defendant. You are instructed:

That in this case the prosecution must prove to you beyond a reasonable doubt, two things, viz.:

(1) That the crime charged in the Information was in fact committed.

(2) That the defendant and no other person committed the crime charged.

[Endorsed]: 3948 Cr. U. S. A. - vs. - P. Piacenza, Defendant's instructions refused. FILED MAR 14, 1923 Chas. N. Williams, Clerk, Edmund L. Smith, Deputy.

IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE SOUTHERN DISRICT OF CALIFORNIA SOUTHERN DIVISION

United States of America, Plaintiff	)	
Vs.	)	No. 3948 Crim.S. D.
P. Piacenza and Frank Moretti Defendants	)	

We, the Jury in the above-entitled cause, find the defendant P. Piacenza Guilty as charged in the FIRST COUNT of the Information and Guilty as charged in the SECOND COUNT of the Information.

Los Angeles, California, March 14th, 1923.

Ray Thomas,
FOREMAN.

FILED MAR 14, 1923
Chas. N. Williams, Clerk
Edmund L. Smith, Deputy.

In the District Court of the United States
IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA.
SOUTHERN Division.

UNITED STATES OF AMERICA, Plaintiff, vs. P. Piacenza Defendant .	No. 3948 Crim. S. D.

I, CHAS. N. WILLIAMS, Clerk of the United States District Court for the Southern District of California, do hereby certify the foregoing to be a full, true, and correct copy of an original JUDGMENT entered in the above-entitled cause; and I do further certify that the papers hereto annexed constitute the JUDGMENT ROLL in said cause.

ATTEST my hand and the seal of said District Court, this 21st day of March A. D. 1923

(SEAL) CHAS. N. WILLIAMS
Clerk.
By B. B. Hansen,
Deputy Clerk.

[Endorsed]:
No. 3948 Crim. In the District Court of the UNITED STATES for the SOUTHERN DISTRICT of California, Southern Division. United States of America, PLAINTIFF vs. P. Piacenza, Defendant. JUDGMENT ROLL Filed March 21st, 1923. CHAS. N.

WILLIAMS Clerk By B. B. Hansen Deputy Clerk
Recorded Min. Book No. 48 page 169

IN THE DISTRICT COURT OF THE UNITED STATES, FOR THE SOUTHERN DISTRICT OF CALIFORNIA.

THE UNITED STATES,
Plaintiff,
vs.
P. PIACENZA,
Defendant.

MOTION IN ARREST OF JUDGMENT.

****

Now comes, P. Piacenza, the defendant in the above styled and numbered cause, and against whom verdict of guilty was rendered in said cause on the 14th, day of March, 1923, and moves the Court to arrest the judgment against him and hold for naught the verdict of guilty rendered against him for the following reasons:

I.

Because on the trial of this cause the evidence was insufficient to prove the venue, and the Court was without jurisdiction to pronounce the judgement.

II.

Because on the trial of the cause the evidence was insufficient to show jurisdiction in this Court to hear and determine this cause.

The defendant therefore prays that this motion be sustained and that the judgement of conviction against him be arrested and held for naught, and that he have all such orders as may be just or proper in the premises, and he will ever pray.

Theo. Gottsdanker

\- - - - - - - - - - - - -

Attorney for Defendant.

[Endorsed]:

3948 Crim. IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA. THE UNITED STATES vs. P. PIACENZA MOTION IN ARREST OF JUDGEMENT. Recd copy Mar 30-1923 Mack Meader Asst U S Atty

FILED MAR 30 1923 CHAS. N. WILLIAMS, Clerk By Louis J. Somers Deputy THEODORE GOTTSDANKER ATTORNEY AND COUNSELOR AT LAW 311-312 Equitable Bank Building Los Angeles, California Phone 16002

IN THE DISTRICT COURT OF THE UNITED STATES, FOR THE SOUTHERN DISTRICT OF CALIFORNIA.

THE UNITED STATES, Plaintiff, vs. P. PIACENZA, Defendant.	MOTION TO SET ASIDE AND VACATE JUDGMENT.

Now comes, P. Piacenza, the defendant in and above styled and numbered cause, and against whom a verdict of*guilyu* was rendered in said Cause on the 14th, day of March, 1923, a*n*d moves the Court to set aside and vacate the judgment against him and hold for naught the verdict of guilty rendered against him for the following reasons:

I.

Because on the trial of this cause the evidence was insufficient to prove the venue, and the Court was without jurisdiction to pronounce the judgment.

II.

Because on the trial of the cause the evidence was insufficient to show jurisdiction in this Court to hear and determine this cause.

The defendant therefore prays that this motion be sustained and that the judgment of conviction against

him be set aside and vacated and held for naught, and that he have all such other orders as may be just and proper in the premises, and he will ever pray.

Theo. Gottsdanker
Attorney for Defendant.

[Endorsed]:

3948 Crim. IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE SOUTHERN DISTRICT OF CALIF. THE UNITED STATES VS. P. PIACENZA MOTION TO SET ASIDE AND VACATE JUDGMENT. Received Copy Mar. 30 - 1923 Mack Meader, Asst U S Atty FILED MAR 30 1923 CHAS. N. WILLIAMS, Clerk Louis J Somers Deputy

THEODORE GOTTSDANKER ATTORNEY AND COUNSELOR AT LAW 311 - 912 Equitable Bank Building Los Angeles, California Phone 16002

IN THE DISTRICT COURT OF THE UNITED STATES, FOR THE SOUTHERN DISTRICT OF CALIFORNIA
SOUTHERN DIVISION.

UNITED STATES OF AMERICA,
Plaintiff,
vs.
P. PIACENZA,
Defendant.

NOTICE OF HEARING OF MOTIONS TO SET ASIDE AND IN ARREST OF JUDGEMENT.

To Joseph Burk, U. S. Attorney and Mack Meader Ass't U. S. Attorney and to the above named Plaintiff:

You and each of you will please take notice that the defendant will on the 9th day of April, 1923 at the hour of 2 P. M. or as soon thereafter as this matter can be heard by the Court, move the Honorable Court in the Departement presided by the Hon. Benjamin F. Bledsoe for an order to vacate and set aside the judgment and the sentence against the defendant previously entered and to arrest said judgement.

The said motions will be based upon the records and files in the case and upon the grounds as set out in the written motion which has been previously been served upon you and filed with this Court.

Theo Gottsdanker
Attorney for Defendant

[Endorsed]: No. 3948 Criminal

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA SOUTHERN DIVIS. THE UNITED STATES VS. P. PIACENZA NOTICE OF MOTIONS. Recd Copy Mack Meader Asst U S Atty FILED APR 2 - 1923 CHAS N. WILLIAMS, Clerk By Chas. V. Rude Deputy THEODORE GOTTSDANKER ATTORNEY AND COUNSELOR AT LAW 311 - 312 Equitable Bank Building Los Angeles, California Phone 16002

IN THE DISTRICT COURT OF THE UNITED STATES, FOR THE SOUTHERN *F*ISTRICT OF CALIFORNIA,

UNITED STATES OF AMERICA,

Plaintiff,

vs.

P. PIACENZA,

Defendant.

STIPULATION EXTENDING TIME TO FILE AND SETTLE BILL OF EXCEPTIONS AND ORDER THEREON.

It is hereby agreed and stipulated by and between the above parties to the within entitled cause thru their respective counsel, that the defendant may have the time in which to file and settle the bill of exceptions, of the exceptions taken to the order of the Court in denying his motions to vacate the judgment and verdict in the cause and in denying the motion in arrest of the judgment, enlarged up to and including the 17th. day of May, 1923.

Mack Meader
Attorney for Plaintiff.
Theo Gottsdanker
Attorney for Defendant.

Upon the filing of the above stipulation, it is hereby ordered that the defendant may have his time in which

to prepare and serve the bill of exceptions to the exceptions taken to the *oder* of the Court denying defendant's motions to vacate and set aside the judgment of the Court and the verdict and in arrest of the judgment in the above entitled *caue, eblarged* up to and *an* including April 24, 1923.

Bledsoe

Judge of U. S. District Court.

[Endorsed]:

No 3948 Criminal IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOTHERN DISTRICT OF CALIFORNIA SOUTHERN DIVISION UNITED STATES OF AMERICA Plaintiff vs. p. Piacenza Defendant STIPULATION FILED APR 17 1923 CHAS. N. WILLIAMS Clerk By Chas. V. Rude Deputy THEODORE GOTTSDANKER ATTORNEY AND COUNSELOR AT LAW 311-312 Equitable Bank Building Los Angeles, California Phone 16002

IN THE DISTRICT COURT OF THE UNITED STATES, FOR THE SOUTHERN DISTRICT OF CALIFORNIA SOUTHERN DIVISION.

THE UNITED STATES OF AMERICA,

Plaintiff,

vs.

P. PIACENZA,

Defendant.

BILL OF EXCEPTIONS TO ORDERS DENYING MOTIONS IN ARREST OF JUDGMENT AND TO VACATE AND SET ASIDE JUDGMENT.

Be it known, that on the 9th. of April, 1923 the motion of the defendant P. Piacenza in arrest of the judgment having been denied and the said defendant excepted to the order of the Court in denying said motion, and the defendant's exception to the ruling and the decision of the court on said motion is hereby duly allowed, and this bill of exceptions settled and allowed.

Be it further known, that on the said 9th. day of April, 1923 the motion of the defendant, P. Piacenza to vacate and set aside the judgment and verdict hav-

ing been denied and the said defendant excepted to the order of the Court in denying said motion, and defendant's exception to the ruling and the decision of the court on said motion is hereby duly allowed, and this bill of exceptions settled and allowed. The ruling of the Court in so denying said motion was based upon the ground that the matter could not be raised in such fashion and that the question of Venue was substantially proven at the trial. B. F. B. O K Meader

Done in open court this 23rd day of April, 1923.

Bledsoe

Judge.

[Endorsed]:

No. 3948 Criminal IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA SOUTHERN DIVISION UNITED STATES, Plaintiff, vs. P. PIACENZA, Defendant. Settled BILL OF EXCEPTIONS Recd Copy Apr. 23 - 1923 Mack Meader Asst U. S Atty FILED APR 23 1923 CHAS. N. WILLIAMS, Clerk By Chas. V. Rude Deputy

THEODORE GOTTSDANKER ATTORNEY AND COUNSELOR AT LAW 311 - 312 Equitable Bank Building Los Angeles, California Phone 16002

(*Testimony of Antone R. Ragon.*)

LOS ANGELES, CALIF., TUESDAY, MARCH 13, 1923; 3:30 P. M.

(Jury impaneled and sworn.)

ANTONE R. RAGON, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

DIRECT EXAMINATION.

Q BY THE CLERK: What is your name?

A Antone R. Ragon

Q BY MR MEADER: What is your occupation?

A Investigator, District Attorney's office.

Q Are you a special deputy sheriff?

A Yes sir.

Q Were you such about the 29th of November, 1921?

A Yes sir.

Q Do you know the premises here? Withdraw that. Do you know the defendant in this case Mr. Piacenza?

A I saw him.

Q Did you see him on or about the 29th day of November, 1921?

A Yes sir.

Q Did you see him in Belvedere?

A Yes sir.

Q On Riverside street?

A Yes sir.

Q Now, who was with you at the time, Mr. Ragon?

A Mr Ballinger.

(*Testimony of Antone R. Ragon.*)

Q Constable of Belvedere?

A Yes sir.

Q Just tell the jury what occurred the first time—Withdraw that. Was there anyone else with you besides Mr Ballinger?

A When I first saw him, no.

Q Now, when you first saw him where was he and what was he doing, and what was said or done, if anything?

A Why, he just got home. He had been out in his machine and had just got home. Me and Mr Ballinger was waiting for Mr O'Leary to come, and we told him - -

Q That was at the premises on Riverside street, Belvedere?

A Yes sir.

Q Let me ask you, had you ever been around those premises before that occasion?

MR. CHAPMAN: Object to that as incompetent, irrelevant, immaterial; not within the issues of the case; no proper foundation laid.

THE COURT: Overruled.

Q BY MR MEADER: Just answer the question.

A Why, yes, I had driven by there several times.

Q Now, do you know whether or not on or about the 29th day of November, 1921, there was a search warrant issued for the premises?

MR. CHAPMAN: Object to that as not being the best evidence.

THE COURT: Overruled.

IN THE DISTRICT COURT OF THE UNITED STATES, FOR THE SOUTHERN DISTRICT OF CALIFORNIA SOUTHERN DIVISION.

UNITED STATES OF AMERICA, Plaintiff, vs. P. PIACENZA, Defendant.	ASSIGNMENT OF ERRORS.

And now comes P. Piacenza, the plaintiff in error and in connection with his petition for a writ of error says that in the record, proceedings, and judgment aforesaid, error has intervened to his prejudice, to wit:

First: The Honorable Benjamin F. Bledsoe, Judge of the District Court of the United States, erred in denying the defendant's motion to direct the jury to find the defendant not guilty on the second count of the information.

Second: The Court erred in not directing the jury at the close of the Government's case to find the defendant not guilty.

Third: The Court erred in not directing the jury to find the defendant not guilty at the close of the whole case.

Fourth: The verdict of the jury is not supprted by any competent evidence in the record.

Fifth: The Court erred in entering the judgement upon the verdict in this case.

Sixth: The Court erred in overruling and denying the motion of the defendant in arrest of judgment.

Seventh: The Court erred in overruling and denying the motion of the defendant to set aside and vacate the judgment entered *aginst* him

Eight: The judgment of the Court is contrary to law.

Wherefore said plaintiff in error prays that the said judgment of the District Court may be reversed and held for naught.

Theo Gottsdanker
Attorney for Petitioner.

[Endorsed]:

No. 3948 Criminal IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA SOUTHERN DIVISION. UNITED STATES OF AMERICA Plaintiff vs. P. PIACENZA Defendant. ASSIGNMENT OF ERRORS Recd Copy April 11th 1923 Mack Meader. FILED APR 11 1923 CHAS. N. WILLIAMS, Clerk By Louis J. Somers Deputy THEODORE GOTTSDANKER ATTORNEY AND COUNSELOR AT LAW 311 - 312 Equitable Bank Building Los Angeles, California Phone 16002

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA SOUTHERN DIVISION.

UNITED STATES OF AMERICA, Plaintiff, vs. P. PIACENZA, Defendant.	PETITION FOR WRIT OF ERROR.

To the Honorable Benjamin F. Bledsoe, Judge of the District Court of the United States, for the Southern District of Califfornia, Southern Division:

And now comes P. Piacenza, the defendant in the above entitled cause, and feeling himself aggrieved by the verdict of the jury and the judgement of the District Court of the United States for the Southern District of California, Southern Division entered on the 14th. day of March, 1923, hereby petitions for an order allowing him said defendant to prosecute a writ of error from the United States Circuit Court of Appeals of the Ninth Circuit to the District Court of the United States for the Southern District of California, Southern Division; that said writ of error may be made a supersedeas and that your petitioner be released on bail in an amount to be fixed by the judge

thereof, pending the final disposition of said writ of error. Assignment of errors is filed with this petition.

P. Piacenza
By Theodore Gottsdanker
His Attorney.

[Endorsed]:

No 3948 Criminal. IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA SOUTHERN DIVISION UNITED STATES OF AMERICA, Plaintiff, vs. P. PIACENZA, Defendant. PETITION FOR WRIT OF ERROR. Recd Copy Apr 11-1923 Mack Meader FILED APR -- 1923 CHAS. N. WILLIAMS, Clerk By Louis J Somers Deputy

THEODORE GOTTSDANGER ATTORNEY AND COUNSELOR AT LAW 311-312 Equitable Bank Building Los Angeles, California Phone 16002

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION.

UNITED STATES OF AMERICA, Plaintiff, vs. P. PIACENZA, Defendant.	) ORDER ALLOWING) WRIT OF ERROR) AND ADMITTING) DEFENDANT TO) BAIL.

Let a Writ of Error issue from the United Circuit Court of Appeals for the Ninth Circuit to the United States District Court for the Southern District of California, Southern Division as prayed for in the

petition of the said defendant, P. Piacenza; and that a citation be issued to the defendant in error.

And it now appearing that a citation has been served in the cause, it is now ordered that the writ of error, allowed as above stated, operate as a supersedeas, and the defendant be admitted to bail, upon furnishing a bond in the penal sum of Five Thousand Dollars conditioned according to law to be approved by me, and that the cost bond is hereby fixed in the sum of Two hundred Fifty Dollars.

Bledsoe

Judge.

[Endorsed]:

No 3948 Criminal IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA SOUTHERN DIVISION. UNITED STATES OF AMERICA Plaintiff vs. P. PIACENZA, Defendant. ORDER ALLOWING WRIT OF ERROR, etc. Recd Copy Mack Meader Apr. 11-1923 FILED APR 11 1923 CHAS. N. WILLIAMS, Clerk By Chas. V. Rude Deputy THEODORE GOTTSDANKER ATTORNEY AND COUNSELOR AT LAW 311-312 Equitable Bank Building Los Angeles, California Phone 16002

IN THE DISTRICT COURT OF THE UNITED STATES SOUTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION.

THE UNITED STATES OF AMERICA, Plaintiff, vs. P. PIACENZA, Defendants.	BAIL BOND AND BOND FOR COSTS.

KNOW ALL MEN BY THESE PRESENTS, That I, P. Piacenza of the County of Los Angeles, State of California, as principal, and Pablo Soto, and Albert Borzicchi and Veneranda Borzicchi, his wife all of the County of Los Angeles State of California as sureties, are held and firmly bound unto the United States of America in the full and just sum of Five Thousand Two Hundred Fifty Dollars ($5,250.00) to be paid to the United States of America, to which payment well and truly we bind ourselves, our heirs, executors and administrators jointly and severally by these presents.

Sealed with our seals and dated this....day of April, 1923.

Whereas, Lately on the 14th day of March, 1923 at the January Term of 1923 of the District Court of the Southern Division of California, Southern District, in a cause pending in said Court, between the United States of America, Plaintiff, and P. Piacenza, Defendant, a judgment and sentence was rendered against said P. Piacenza, and said P. Piacenza obtained a writ of Error from the United States Circuit

Court of Appeals for the Ninth Circuit to the said United States District Court to reverse the judgment and sentence in the aforesaid suit, and a citation directed to the said United States of America, citing and admonishing the United States of America to be *an* appear in the said Court thirty days from the date thereof, which citation has been fully served.

Now the condition of said obligation is such, that if the said P. Piacenza shall appear in the United States Circuit Court of Appeals for the Ninth Circuit when said cause is reached for argument or when required by law or rule of said Court, and from day to day thereafter in said Court until said cause shall be finally disposed of, and shall abide by and obey the judgment and all orders made by the said Court of Appeals in said cause, and shall surrender himself in execution of the judgment and sentence appealed from as said Court may direct and shall further pay all of the costs of the clerk for preparing the record as provided by law up to and not exceeding the sum of two hundred fifty Dollars, if the sentence and judgment against him shall be affirmed, and if he shall appear for trial in the District Court and abide by and obey all orders of said Court, provided the judgment and sentence against him shall be reversed by the United States Circuit Court of Appeals for the Ninth Circuit, then the above obligation to be void, otherwise to remain in full force, virtue and effect.

It is also the condition of the above bond that the defendant will pay all or any costs of the Clerk not

to exceed the sum of Two hundred fifty dollars in either case whether the judgment and sentence appealed from is affirmed or reversed by the said United States Circuit Court of Appeals for the Ninth Circuit.

P. Piacenza

Pablo Soto

Albert Borzicchi

Veneranda Borzicchi

SOUTHERN DISTRICT OF CALIFORNIA, SS.

Pablo Soto and Albert Borzicchi and Veneranda Borzicchi being duly sworn, each for himself deposes and says that he is a householder is said District and is worth the sum of Five Thousand Two Hundred Fifty Dollars of property exempt from execution and over and above all debts and liabilities.

(Seal) Pablo Soto
Albert Borzicchi
Veneranda Borzicchi

Subscribed and sworn to before me 20 day of April, 1923

Chas N Williams Clerk
By Louis J Somers deputy

Examined and recommended for approval as provided in Rule 29.

Theo Gottsdanker
ATTORNEY

The form of the foregoing Bond and the sufficiency of the sureties thereto is hereby approved.

Wm P James

Judge

Dated: 21 day of April, 1923.

Approved as to form

R B Camarillo Asst U. S. Atty.

[Endorsed]:

No. 3948 Criminal

IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA SOUTHERN DIVISION

THE UNITED STATES vs. P. PIACENZA BOND on appeal & for costs

FILED APR 21 1923 CHAS. N. WILLIAMS, Clerk By Chas. V. Rude Deputy

THEODORE GOTTSDANKER ATTORNEY AND COUNSELOR AT LAW 311-312 Equitable Bank Building Los Angeles, California Phone 16002

UNITED STATES OF AMERICA

District Court of the United States
SOUTHERN DISTRICT OF CALIFORNIA

United States of America		CLERK'S OFFICE Criminal
	vs.	No. 3948
P. Piacenza		PRÆCIPE

TO THE CLERK OF SAID COURT:

Sir:

Please issue Judgment Roll, Defendant's Notice of Motions Defendant's Motion to set aside and vacate Judgment Defendant's Motion in Arrest of Judgment Order Allowing Writ of Error Assignment of Errors Petition for Writ of Error Stipulation Extending Time to file and settle Bill of Exceptions. Bill of Exceptions, Writ of Error Transcription from Reporter's Transcript Pages 1 to 2 inclusive. Citation Bail Bond & Cost Bond

Theo Gottsdanker
Atty for Defendant.

[Endorsed]:

Criminal No. 3948 U. S. District Court SOUTHERN DISTRICT OF CALIFORNIA United States vs. P. Piacenza PRÆCIPE

FILED MAY 14, 1923 CHAS. N. WILLIAMS, Clerk, B B Hansen Deputy

IN THE DISTRICT COURT OF THE UNITED STATES, FOR THE SOUTHERN DISTRICT OF CALIFORNIA SOUTHERN DIVISION.

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	
vs.	)	CLERK'S CERTIFICATE.
P. PIACENZA,	)	
Defendant.	)	

I, CHAS. N. WILLIAMS, Clerk of the United States District Court for the Southern Dstrict of California, do hereby certify the foregoing volume containing 41 pages, numbered from 1 to 41 inclusive, to be the Transcript of Record on Writ of Error in the above entitled cause, as printed by plaintiff in error and presented to me for comparison and certification, and that the same has been compared and corrected by me and contains a full, true and correct copy of the judgment roll, notice of motions, motion to set aside and vacate judgment, motion in arrest of judgment, order allowing writ of error, assignment of errors, petition for writ of error, stipulation extending time to file and settle bill of exceptions, bill of exceptions, writ of error, citation, bond, transcription from reporter's transcript pages 1 and 2 inclusive and praecipe.

I DO FURTHER CERTIFY that the fees of the Clerk for comparing, correcting and certifying the foregoing Record on writ of error amount to..... and that said amount has been paid me by the plaintiff in error herein.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the Seal of the District Court of the United States of America, in and for the Southern District of California, Southern Division, this.....day of May, in the year of our Lord One Thousand Nine Hundred and Twenty-three, and of our Independence the One Hundred and Forty-seventh.

CHAS. N. WILLIAMS,
Clerk of the District Court of the United States of America, in and for the Southern District of California.

By

Deputy.

No. 4041.

IN THE

United States
Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

P. Piacenza,
Plaintiff in Error,
vs.
United States of America,
Defendant in Error

BRIEF OF PLAINTIFF IN ERROR.

THEODORE GOTTSDANKER,
Attorney for Plaintiff in Error.

Parker, Stone & Baird Co., Law Printers, 232 New High St., Los Angeles.

No. 4041.

IN THE

United States

Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

P. Piacenza,
Plaintiff in Error,
vs.
United States of America,
Defendant in Error

BRIEF OF PLAINTIFF IN ERROR.

P. Piacenza, plaintiff in error herein was accused by the United States attorney for the Southern District of California as follows [Tr. of Record, pp. 5, 6 and 7]:

"Form No. 689.

In the DISTRICT Court of the United States, For the SOUTHERN District of CALIFORNIA
SOUTHERN DIVISION

THE UNITED STATES
vs.
P. PIACENZA and FRANK MORETTI,
.....
.....

INFORMATION. VIOLATING SECTION 21 & 25 Title II of the National Prohibition Act of October 28, 1919

UNITED STATES OF AMERICA, }
SOUTHERN DISTRICT OF CALIFORNIA } ss:

Be it Remembered, That JOSEPH C. BURKE the Attorney of the United States for the Southern District of California who prosecutes in behalf and with the authority of the United States, comes here in person into Court at this January Term thereof, and for the United States gives the Court to understand and be informed that one P. PIACENZA and FRANK MORETTI, whose full and true names are other than as herein stated, are to affiant unknown, late of the Southern Division of the Southern District of California, heretofore, to wit: on or about the 29th day of November, 1921, at Belvidere, County of Los Angeles, within said division and district, and within the jurisdiction of the United States and this Honorable Court, did knowingly, wilfully and unlawfully maintain a common nuisance, to-wit: a room, building and place on Riverside Street, Belvidere, County of Los Angeles, where intoxicating liquors then and there containing alcohol in excess of one half of one percent by volume, were manufactured, kept, sold and bartered for beverage purposes; in violation of Section 21, Title II of the National Prohibition Act of October 28, 1919.

Contrary to the form of the statute in such case made and provided and against the peace and dignity of the said United States.

SECOND COUNT.

And the said Joseph C. Burke, who prosecutes for the United States as aforesaid, does further give the Court to understand and be informed:

That P. PIACENZA and FRANK MORETTI, whose full and true names are other than as herein

stated, to affiant unknown, late of the Southern Division of the Southern District of California, heretofore, to wit: on or about the 29th day of November, 1921, at Belvidere, County of Los Angeles, within said division and district, and within the jurisdiction of the United States and this Honorable Court, did knowingly, wilfully and unlawfully have in their possession certain property and apparatus designed for the manufacture of intoxicating liquor for beverage purposes containing alcohol in excess of one half of one per-cent, to wit: two stills, 50 gallons mash destroyed, five gallons moonshine and tools; in violation of Section 25, Title II of the National Prohibition Act of October 28, 1919.

contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

Whereupon, the said United States Attorney for the District aforesaid prays the consideration of this Court here in the premises, and that due process of law may be awarded against the said P. PIACENZA and FRANK MORETTI defendants, in this behalf to make their answer to the United States touching and concerning the premises.

Dated at Los Angeles, this 29th day of March, A. D. 1922.

Joseph C. Burke
United States Attorney for the Southern District of California

Mark L. Herron
Assistant United States Attorney."

He was tried by a jury and found guilty as charged on both counts. From these verdicts, the judgment of the court and from its order denying his motions

in arrest of judgment and to set aside and vacate the judgment the plaintiff in error prosecutes this writ of error. [Tr. of Record, pp. 21, 22, 23, 24 and 25.]

STATEMENT.

There is only one point which the plaintiff in error raises. That point is: That there is not sufficient quantum of proof produced necessary to establish the venue.

The only evidence introduced upon this point by the Government is the testimony of Antonio R. Ragon who testified as follows [Tr. of Record, pp. 30 and 31]:

"(*Testimony of Antone R. Ragon.*)

LOS ANGELES, CALIF., TUESDAY, MARCH 13, 1923; 3:30 P. M.

(Jury impaneled and sworn.)

ANTONE R. RAGON, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

DIRECT EXAMINATION.

Q BY THE CLERK: What is your name?

A Antone R. Ragon

Q BY MR MEADER: What is your occupation?

A Investigator, District Attorney's office.

Q Are you a special deputy sheriff?

A Yes sir.

Q Were you such about the 29th of November, 1921?

A Yes sir.

Q Do you know the premises here? Withdraw that. Do you know the defendant in this case Mr. Piacenza?

A I saw him.

Q Did you see him on or about the 29th day of November, 1921?

A Yes sir.

Q Did you see him in Belvedere?

A Yes sir.

Q On Riverside street?

A Yes sir.

Q Now, who was with you at the time, Mr. Ragon?

A Mr. Ballinger.

Q Constable of Belvedere?

A Yes sir.

Q Just tell the jury what occurred the first time—Withdraw that. Was there anyone else with you besides Mr. Ballinger?

A When I first saw him, no.

Q Now, when you first saw him where was he and what was he doing, and what was said or done, if anything?

A Why, he just got home. He had been out in his machine and had just got home. Me and Mr. Ballinger was waiting for Mr O'Leary to come, and we told him—

Q That was at the premises on Riverside street, Belvedere?

A Yes sir.

Q Let me ask you, had you ever been around those premises before that occasion?

MR. CHAPMAN: Object to that as incompetent, irrelevant, immaterial; not within the issues of the case; no proper foundation laid.

THE COURT: Overruled.

Q BY MR. MEADER: Just answer the question.

A Why, yes, I had driven by there several times.

Q Now, do you know whether or not on or about the 29th day of November, 1921, there was a search warrant issued for the premises?

MR. CHAPMAN: Object to that as not being the best evidence.

THE COURT: Overruled.

This is the only testimony either direct or circumstantial which the Government introduced to establish the venue, and which we urge is certainly not sufficient.

According to this testimony the crime occurred at a place called Belvedere on Riverside street. [Tr. of Record, pp. 30 and 31.] There is not a scintilla of evidence to show where Belvedere is, whether it is in California or in what county.

The information alleges [Rec. of Tr., pp. 5 and 6] that: "on or about the 29th day of November, 1921, at Belvedere, county of Los Angeles, within said division and district and within the jurisdiction of the United States and this Honorable Court, did knowingly, wilfully and unlawfully maintain a common nuisance to-wit, a room, building and place on Riverside street, Belvidere, county of Los Angeles, etc." In the second count practically the same allegation is found as to venue.

The plaintiff in error respectfully submits that there is no proof to sustain the above allegation. There is no evidence to show that Belvedere is in Los Angeles county or within the division and district of the court. On this point we desire to call the court's attention that there is in fact a Belvedere in Marin county. (The New Reference Atlas of the World, published by Hammond & Co., New York, 1923, pages 88 and 89.)

The United States Constitution provides as follows:

> "In all criminal prosecutions the accused shall enjoy the right to speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law. * * *"

6th Amend. to U. S. Constitution.

The plaintiff in error respectfully calls the attention of this Honorable Court to the case of Moran v. U. S., 264 Fed. 768, which by the way is also a liquor case, in which the court held: "It is incumbent upon the Government to prove venue in a prosecution under the act."

The Supreme Court of the United States in the case of Vernon v. U. S., 146 Fed. 121, said that the venue is as material as any other allegation in the information and the burden to prove it is on the Government.

In an Arkansas case, which was for murder, the highest court of that state awarded the defendant a new trial upon the ground that the indictment alleged that the crime was committed in the county of St. Francis, but the evidence failed to sustain that allegation.

Dobson v. State, 17 S. W. 3.

It has been also held in the case *supra* and in the case of U. S. v. Ross, 92 U. S. 284, that no presumption can be indulged in to prove the venue. The con-

sensus of opinion of our highest tribunals are that venue must be proven by evidence just as any other material allegation of the information, which in this case the Government has failed to do.

Calling the attention of the Honorable Court that there are at least two Belvederes in the state of California, and also to the fact that there is no testimony to show that the Belvedere where it is charged the crime was committed is situated in the state of California, or within the division and district of the court, the Government has failed to prove the venue, which makes it necessary to reverse the judgment.

Wherefore, plaintiff in error prays that said judgment of the District Court may be reversed and held for naught.

THEODORE GOTTSDANKER,
Attorney for Plaintiff in Error.

No. 4042

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

MATIAS IDOATA,

Plaintiff in Error,

vs.

UNITED STATE OF AMERICA,

Defendant in Error.

Transcript of the Record

Upon Writ of Error from the United States District Court for the District of Idaho, Southern Division.

CAPITAL NEWS PUBLISHING CO., BOISE

No.....

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

MATIAS IDOATA,

Plaintiff in Error,

vs.

UNITED STATE OF AMERICA,

Defendant in Error.

Transcript of the Record

Upon Writ of Error from the United States District Court for the District of Idaho, Southern Division.

NAMES AND ADDRESSES OF ATTORNEYS OF RECORD.

ROBERT HIBBARD,
Boise, Idaho,
Attorney for Plaintiff in Error.

E. G. DAVIS,
United States Attorney,

JOHN H. McEVERS,
Assistant United States Attorney,

McKEEN F. MORROW,
Assistant United States Attorney,
Attorneys for Defendant in Error. . .

INDEX

Page

Assignment of Error 35

Bill of Exceptions No. 1 14
Bill of Exceptions No. 2 20

Citation 42
Clerk's Certificate 44

Information 7

Judgment 13

Minute Entry 11

Names and addresses of attorneys of Record 4

Order Granting Writ of Error 38

Petition for Writ of Error 34
Praecipe and Stipulation 39

Verdict 12

Writ of Error 41

Witnesses on Part of Defendant.

IDOATA, MATIAS—
Direct 30
Cross 31

Page

OSLER, O. V.—
Direct 33
Cross 33

URRUTIA, MARIA—
Direct 29
Cross 29

WINTER, HARRY—
Direct 32
Cross 32

Witnesses on Part of Plaintiff.

KUCKENBECKER, O. E.—
Direct 25
Cross 27

REDMAN, R. F.—
Direct 21
Cross 24

REYNOLDS, PAUL—
Direct 27
Cross 28

STEUNENBERG. C. B.—
Direct 28

In the District Court of the United States, in and for the District of Idaho, Southern Division.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

MATIAS IDOATA, MARIA URRUTIA,
Defendants.

No. 971.

INFORMATION.

E. G. Davis, United States Attorney for the District of Idaho, who for the United States in this behalf prosecutes in his own proper person comes into Court on this 10th day of April, 1923, and with leave of the Court first had and obtained upon his official oath gives the Court here to understand and be informed as follows:

COUNT ONE

(Possession)

That Matias Idoata and Maria Urrutia, late of the County of Cassia, State of Idaho, heretofore, to-wit, on or about the 17th day of March, 1923, at Burley, Idaho, in the said County of Cassia, in the Southern Division of the District of Idaho and within the jurisdiction of this Court, did then and there wilfully, knowingly and unlawfully have in their possession certain intoxicating liquor containing more than one-half of one per cent of alcohol,

to-wit, certain spirituous liquors commonly known as "moonshine whiskey", the exact amount of which is to this informant unknown, the same being designed, intended and fit for use as a beverage, the possession of same being then and there prohibited and unlawful and contrary to the form of the statute in such case made and prohided, and against the peace and dignity of the United States of America.

COUNT TWO

(Sale)

That Matias Idoata and Maria Urrutia, late of the County of Cassia, State of Idaho, heretofore, to-wit, on or about the 17th day of March, 1923, at Burley, Idaho, in the said County of Cassia in the Southern Division of the District of Idaho, and within the jurisdiction of this Court, did then and there wilfully, knowingly and unlawfully sell a quantity of intoxicating liquor containing more than one-half of one per cent of alcohol, to-wit, four drinks of a certain spirituous liquor commonly known as "moonshine whiskey", the same being designed, intended and fit for use as a beverage, the sale of same being then and there prohibited and unlawful and contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

COUNT THREE

(Possession)

That Matias Idoata and Maria Urrutia, late of the County of Cassia, State of Idaho, heretofore, to-wit, on or about the 20th day of March, 1923, at Burley, Idaho, in the said County of Cassia, in the Southern Division of the District of Idaho and within the jurisdiction of this Court, did then and there wilfully, knowingly and unlawfully have in their possession certain intoxicating liquor containing more than one-half of one per cent of alcohol, to-wit, about a quart of a certain spirituous liquor commonly known as "moonshine whiskey", the same being designed, intended and fit for use as a beverage, the possession of same being then and there prohibited and unlawful and contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

COUNT FOUR

(Nuisance)

That Matias Idoata and Maria Urrutia, late of the County of Cassia, State of Idaho, heretofore, to-wit, on or about the 20th day of March, 1923, at Burley, Idaho, in the said County of Cassia, in the Southern Division of the District of Idaho and within the jurisdiction of this Court, did then and there wilfully, knowingly and unlawfully maintain, keep and operate that certain place known as the Casa

Espanola and located at 614 North Overland Street, Burley, Cassia County, Idaho, as a public and a common nuisance, to-wit, as a place where intoxicating liquors containing more than one-half of one per cent of alcohol, to-wit, certain spirituous liquors commonly known as "moonshine whiskey", the same being designed, intended and fit for use as a beverage, were sold, kept and bartered, said acts and things herein charged being then and there prohibited and unlawful, and contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

E. G. DAVIS,
United States Attorney for the District of Idaho.

United States of America,)
District of Idaho,) ss.
Southern Division,)

John H. McEvers, being first duly sworn on his oath, deposes and says: That he is a duly appointed, qualified and acting Assistant United States Attorney for the District of Idaho, and that he makes this verification as such, that he has read the above and foregoing information, knows the contents thereof, and that the facts and things here-

in stated are true as he verily believes.

JOHN H. McEVERS,

Subscribed and sworn to before me this 9th day of April, 1923.

W. D. McREYNOLDS,
Clerk of the United States Dist. Court.
By Pearl E. Zanger,
(SEAL) *Deputy.*

Leave is hereby granted to file the foregoing information.

FRANK S. DIETRICH,
District Judge.

Endorsed, Filed April 10, 1923.
W. D. McREYNOLDS, Clerk.

MINUTE ENTRY.

At a stated term of the District Court of the United States for the District of Idaho, held at Boise, Idaho, on Saturday the 14th day of April, 1923, the following proceedings, among others, were had, to-wit:

Present, Hon. Frank S. Dietrich, Judge.

United States of America,	)	
vs.	)	Criminal
Matias Idoata and Maria Urrutia,	)	No. 971.
Defendants.	)	

Comes now John H. McEvers, Assistant Dis-

trict Attorney, with the defendants into Court, the defendants to be arraigned upon the information. When asked by the Court if they were informed against by their true names, the defendant Mats Idoata stated that his true name was Matias Idoata. The reading of the information was waived by the defendants who were informed of the contents thereof by the Court. When asked by the Court whether their pleas were guilty or not guilty of the offenses charged in the information, Matias Idoata plead guilty on the first and third counts, and not guilty on the second and fourth counts. The defendant Maria Urrutia entered a plea of not guilty to all of the counts.

(Title of Court and Cause.)

No. 971.

VERDICT.

We, the jury in the above entitled cause, find the defendant, Matias Idoata, guilty on the second count, and guilty on the fourth count, and we find the defendant, Maria Urrutia, not guilty on the first count, not guilty on the second count, not guilty on the third count, and not guilty on the fourth count, as charged in the information.

V. T. CRAIG,

Foreman.

Endorsed, Filed April 25, 1923,

W. D. McREYNOLDS, Clerk.

(Title of Court and Cause.)

No. 971.

JUDGMENT.

Convicted of

VIOLATION NATIONAL PROHIBITION ACT.

Now, on this 2nd day of May, 1923, the United States District Attorney, with the defendant, Matias Idoata and his counsel, Robert Hibbard, Esq., came into Court; the defendant was duly informed by the Court of the nature of the information filed against him for the crime of Violation National Prohibition Act committed on the 17th day of March, A. D. 1923; of his arraignment and plea of not guilty as charged in the second and fourth counts in the information, of his trial and the verdict of the jury on the 25th day of April, A. D., 1923. "Guilty as charged in the second and fourth counts in the information." The defendant was then asked by the Court if he had any legal cause to show why judgment should not be pronounced against him, to which he replied that he had none, and no sufficient cause being shown or appearing to the Court.

Now, therefore, the said defendant having been convicted of the crime of Violation National Prohibition Act,

It is hereby considered and adjudged that the said defendant Matias Idoata do pay a fine of $200.00 and $200.00 and that he be imprisoned and

kept in the County Jail of Twin Falls County, Idaho, for the term of Two (2) Months, a stay of execution of this judgment was granted to May 9th, 1923.

(Title of Court and Cause.)

No. 971.

BILL OF EXCEPTIONS.

No. 1.

BE IT REMEMBERED, that on the 24th day of April, 1923, before the trial of the above entitled cause, the defendant, Matias Idoata, filed with the Clerk of the above entitled Court a Petition for and order restraining the use of property as evidence in the above entitled cause; that the following is a copy of said petition and the exhibits annexed thereto:

(Title of Court and Cause.)

(Petition for and Order Restraining Use of Property as Evidence.)

"Comes now the defendant, Matias Idoata, and states that at all times hereinafter mentioned he resided with his family in a dwelling located on Lot 20, Block 88, No. 614 North Overland Street, Burley, Cassia County, Idaho.

That on the 20th day of March, 1923, certain government and state officers, none of whom are known to this petitioner, without authority, except as hereinafter alleged, searched said dwelling and

home and seized the following described property, to-wit: four small glasses and a bottle containing about a pint of moonshine whiskey, contrary to and in violation of Section 17, Article I, of the Constitution of the State of Idaho, and of the fourth and fifth amendments to the Constitution of the United States of America.

That said officers or any of them had any warrant or authority to make said search except from a pretended search warrant issued by one John Jackson, United States Commissioner, of Boise, Idaho, a copy of which search warrant is marked Exhibit A, attached hereto and made a part hereof; said warrant was based upon and issued on the authority of a pretended and insufficient affidavit of one Paul Reynolds, a copy of which is attached hereto and made a part hereof and marked Exhibit B; that said affidavit was insufficient and afforded no basis for the issuance of a search warrant for the following reasons:

First: It did not set out facts from or upon which the affiant based his belief and information as required by law.

Second: It did not describe the property to be seized as required by the Fourth Amendment to the Constitution of the United States of America.

That the District Attorney, Marshal and Clerk of the above entitled Court took the above mentioned property into their possession and have failed and refused to return the same or any part thereof to your petitioner, although demand has been made on each of them to so do. That the said property is being wrongfully held and detained by them in violation to this petitioner's rights under the Constitution of the United States and of the State of Idaho.

Tha said District Attorney purposes to use said property as evidence at the trial of the above entitled cause, as evidence against this defendant and

that by reason thereof and of the facts set forth the defendant's rights will be violated under the Constitution of the United States and of the State of Idaho, unless the Court orders the return of said property or restricts or prevents the use of any property seized or any information obtained, on or by the authority of the search warrant herein mentioned and described, from being used against the defendant as evidence.

WHEREFORE, Petitioner prays that the Court direct an order to the District Attorney, Marshal and said Clerk, restraining the use of any property obtained as a result of the aforementioned illegal search warrant, in the above entitled cause.

Signed MATIAS IDOATA."

State of Idaho,)
) ss.
County of Ada,)

Matias Idoata, being first duly sworn, deposes and says: That he is the petitioner above named, that he has had said petition read to him, knows the contents thereof and that he believes the facts contained therein are true.

Signed MATIAS IDOATA."

Subscribed and sworn to before me this 25th day of April, 1923.

Signed B. W. OPPENHEIM,
Notary Public for Idaho.
Residence: Boise, Idaho.

EXHIBIT A.—SEARCH WARRANT.

UNITED STATE OF AMERICA,)
District of Idaho,) ss.
Southern Division,)

To Elias Marsters, Federal Prohibition Director, for the District of Idaho, and to his agents, or and or either of them,—GREETING:

WHEREAS, complaint on oath and in writing,

supported by affidavits, has this day been made before me, John Jackson, a United States Commissioner for said district, by Paul E. Reynolds, alleging that he has reason to believe, and does believe, that within a certain house, store, or building in this distict, to-wit: that certain building located on Lot 20, Block 88, being No. 614 North Overland Street, Burley, Cassia County, Idaho, being occupied by John Doe (Mexican) known as the Casa Espanola, there is located certain property, to-wit, whiskey, beer and other intoxicating liquors which is being used as a means of committing a misdemeanor, to-wit, a violation of the National Prohibition Act of the statutes of the United States of America;

And whereas, the particular grounds or probable cause for the issuance of this warrant and the names of the persons whose affidavits have been taken in support hereof are as follows:

That the said Paul E. Reynolds has been informed by a reliable party whose name affiant does not care to disclose, that the said party has seen intoxicating liquors possessed and sold by the said Mexican at the Casa Espanola on the premises described above.

And whereas the undersigned is satisfied of the existence of the grounds of the said application, and that there is probable cause to believe their existence.

You are Therefore Hereby Commanded, in the name of the President of the United States, to enter said premises in the day time only, with the necessary and proper assistance, and forthwith search the same—except the rooms occupied by permanent lodgers or roomers in said rooming house, solely as a private dwelling for the property herein specified, and bring the same if found, before the undersigned or any other Commissioner having juris-

diction of said matter, and report the act concerning the same as required by law.

Witness my hand and seal this 19th day of March, 1923.

Signed JOHN JACKSON,
(SEAL) *United States Commissioner.*

On the back of above Exhibit was the following:

RETURN OF SEARCH WARRANT.

Returned this 21st day of March, 1923. Served, by making search as within directed upon which search, I found, seized, and took possession of the following property and articles: One bottle moonshine whiskey, four whiskey glasses, and duly inventoried the same as above, according to law, leaving with defendant at said place a receipt therefor.

Signed PAUL E. REYNOLDS,

I, Paul E. Reynolds, the officer by whom this warrant was executed, do swear that the above inventory contains a true and detailed account of the property taken by me on this warrant.

Signed PAUL E. REYNOLDS.

Sworn to and subscribed before me, this 21st day of March, 1923.

Signed JOHN JACKSON,
United States Commissioner.
District of Idaho, Southern Division.

EXHIBIT B.—AFFIDAVIT FOR SEARCH WARRANT.

UNITED STATES OF AMERICA,)
District of Idaho,) ss.
Southern Division.)

On this 19th day of March, 1923, before me, John Jackson, a United States Commissioner for

the District of Idaho, Southern Division, personally appeared Paul E. Reynolds, who, being by me first duly sworn, did depose and say: That he has reason to believe, and does believe, that within a certain house, store, building, or other place, in this District of Idaho, to-wit: that certain dwelling located on Lot 20, Block 88, No. 614, North Overland Street, Burley, Cassia County, Idaho, occupied by John Doe (Mexican) known as the Casa Espanola, there is located certain property, to-wit: whiskey, beer and other intoxicating liquors, which is being used as the means of committing a misdemeanor, to-wit, a violation of the National Prohibition Act of the Statutes of the United States; that the facts ending to establish the grounds of this application, and the probable cause of deponent believing that such facts exist are as follows: That the said Paul E. Reynolds has been informed by a reliable party whose name he does not care to disclose, that the said party has seen intoxicating liquors possessed and sold by the said Mexican at the Casa Espanola on premises described above.

Signed PAUL E. REYNOLDS.

Sworn to before me this 19th day of March, 1923.

Signed JOHN JACKSON,

(Seal) *U. S. Commissioner as aforesaid.*

BE IT ALSO REMEMBERED, that the 25th day of April, at 9:30 A. M., was the date and hour set by the Court to hear said motion and petition. That Robert Hibbard appeared as counsel for petitioner and J. H. McEvers appeared on behalf of plaintiff. That said motion was thereupon duly submitted to the above entitled Court and after hearing counsel the said Court overruled defendant's petition and motion and allowed the defendant an exception to said ruling.

Wherefore, the defendant Matias Idoata, presents the foregoing as his Bill of Exceptions No. I,

and prays that the same be settled and allowed and signed and sealed by the Court, together with his Bill of Exceptions No. 2.

ROBT. HIBBARD,
Attorney for Defendant.

The foregoing is duly allowed and settled as the defendant's Bill of Exceptions No. I.

Dated at Boise, Idaho, this 12th day of May, 1923.

FRANK S. DIETRICH,
Judge.

Service of the foregoing Bill of Exceptions admitted and acknowledged by receipt of a copy thereof this 18th day of May, 1923.

McKEEN F. MORROW,
Assistant U. S. District Atty.

(Title of Court and Cause.)

No. 971.

Criminal.

BILL OF EXCEPTIONS.

No. 2.

BE IT REMEMBERED, that on the trial of this cause, in the above entitled Court, at the April term, 1923, of said Court, the Honorable F. S. Dietrich, presiding, when the following proceedings were had, to-wit:

The jury was impannelled and sworn according to law and thereupon the following proceedings were had:

John H. McEvers, Assistant United States District Attorney, read the information to the jury and in-

formed the jury that the defendant, Maria Urrutia had plead not guilty to the four counts contained therein and that the defendant, Matias Idoata, had plead guilty to the two counts of possession and not guilty to each of the two counts charging sale and nuisance.

Thereupon the plaintiff to sustain issue upon its part called R. F. Redman, who testified as follows:

Witness resides at Twin Falls, Idaho. Occupation is that of a private detective. Was employed by part of the people of Burley, Idaho, on March 17th, 1923. Saw the defendant on the 17th day of March, 1923, in the Casa Espanola, at Burley. Went there to buy a drink and walked through dining room into kitchen seeing the defendant Matias Idoata in the dining room with another man. The party with witness asked Matias Idoata if there was any chance to get a drink and defendant told him to go in the kitchen. They went into the kitchen and Earl Padgett, his companion, asked for drinks and the defendant Maria Urrita got a bottle from the left hand flour bin of the kitchen cabinet and served the drinks in whiskey glasses. He gave Earl Padget one dollar and said party paid for the drinks, which were commonly known as moonshine whiskey. Went back there on March 20th, 1923, with Mr. Reynolds and Mr. Kuchenbecker with a search warrant and searched the

same flour bin in which he previously saw the liquor.

By MR. McEVERS:

Q. Now I will ask you whether or not you searched the same barrel or flour bin in which you saw the liquor before when you were there?

A. I did.

Q. What did you find when you were there then?

A. I found a bottle.

Q. Handing you for identification Government's Exhibit I, I will ask you whether or not you saw that before?

A. I did.

Q. Where did you get it?

A. Out of the flour bin.

Q. That was the time when you searched the—

MR. HIBBARD: For the purpose of keeping my record clear, I object to the testimony of this witness with reference to this bottle, Plaintiff's I, and object to it, if the Assistant District Attorney wishes to offer it in evidence, on the ground of it being incompetent, irrelevant, and immaterial, and for the further reason that it was obtained under an illegal search warrant and should not be used against the defendant Matias Idoata and request that the last answer be stricken and that said exhibit be removed from the court room. I also object upon the same grounds to any evidence that

this witness may testify to obtained at the time of this search.

THE COURT: Overruled. Exception allowed.

Q. (By Mr. McEvers) Now did you get that on the 20th of March, 1923, when you were there with the officers?

A. Yes, sir.

Q. Did you make an examination of it when you first got it to see what it contained?

A. Pulled the cork.

Q. Smell of it?

A. Yes, sir.

Q. What was in it when you took it out of the barrel?

A. The same as it is now, I guess.

Q. What was in it then, do you know?

A. Whiskey, I suppose; I didn't taste it; I smelled of it.

Q. Did you then know moonshine whiskey when you smelled it?

A. Yes, sir.

Q. What was in that bottle?

A. Moonshine.

Q. Handing you Government's Exhibit 2, which we have here as four glasses, I will ask you whether or not you saw those before?

MR. HIBBARD: May my same objection and exception go to this testimony?

THE COURT: Yes.

Thereupon witness testified that he found

glasses March 20th on the kitchen cabinet and that they were the similar to the glasses he drank from on the occasion of his first visit. That the witness is familiar with the glasses, that were during the days of licensed saloons, used as whiskey glasses, and that the glasses referred to as "Government's Exhibit No. 2," are the same as the old-fashioned whiskey glasses. This bottle was turned over to the officers, Reynolds and Kuchenbecker. That both of the defendants were there March 20th, 1923. That the Casa Espanola is a Spanish rooming and boarding house. Did not know who was running the place.

CROSS EXAMINATION.

Did not know defendant Matias Idoata prior to March 17th, 1923. Earl Padgett was not present at the time search was made. No other conversation with women in kitchen at time drinks were purchased other than asking for a drink. When asked for drinks the defendant, Maria Urrutia, went to the flour bin, took out the bottles and poured the drinks out. Gave Padgett a dollar and when first two drinks were purchased she went into the dining room to get it changed and brought it back and Pedgett slipped it to me and I bought the other two drinks, twenty-five cents a drink. Gave an unmarked silver dollar. Did not have any trouble in recognizing the parties when search warrant was served. Did not see the defendant's wife at time

of search, she was in bed sick. The woman defendant tried to take it away from me when I got my hands on it. Witness left Burley after the raid. Employed in past on the police force in Twin Falls and served as a deputy sheriff at Twin Falls.

O. E. KUCKENBECKER, was produced as a witness on behalf of plaintiff, being first duly sworn testified as follows:

That he lives in Boise, Idaho, is a federal prohibition agent and has been for past year. Was in Burley, Idaho, March 20th, 1923, and in company with Reynolds and Redman made a search of the Casa Espanola. Had a search warrant.

By MR. McEVERS:

Q. Did you, in company with Reynolds and Redman, make a search of the Casa Espanola?

A. Yes, sir.

Q. Where is that located, do you know?

A. I don't know the street. It is about two blocks and a half from the depot, I believe, track.

Q. What was the occasion of your making the visit that day?

A. We had a search warrant for the place.

Q. And did you search it?

A. Yes, sir.

Q. Who was there when you arrived?

A. Mr. Reynolds and I and Mr. Redman went through the front door, and as we went through the main part—I think it is used as a dining room,

Mr. Redman says, "There is the proprietor"—

MR. HIBBARD: Just a minute. Your Honor, I object to this line of testimony, on the same grounds that I did before, for the matter of the record, so that I may have my record clear as to each witness.

THE COURT: You mean because of your claim of the illegality of the search warrant?

MR. HIBBARD: Yes, an evidence that was obtained in the house on March 20th, 1923, at the time the search was made.

THE COURT: I understand your objection. It may be understood as going to the evidence.

MR. HIBBARD: To the evidence of all the wit-witnesses.

THE COURT: Yes.

MR. HIBBARD: Please note an exception.

THE COURT: Yes, you may have an exception.

Thereupon the witness testified that Mr. Reynolds had the search warrant and that before they went in Mr. Redman told them in the presence of the defendant that Matias Idoata was the proprietor. Redman and witness went directly back into the kitchen where the defendant Maria Urrutia was standing alongside of the cupboard. Mr. Redman opened the flour bin and raised out the bottle and the lady grabbed hold of it. Mr. Redman jerked it out of her hand. Glasses were along side of or on top of flour bin. Bottle same as Plaintiff's Exhibit I. Put initials on it at that time. Smelled of

contents at that time and that it contained an intoxicating beverage known as moonshine whiskey. Tagged and sealed Exhibit I, at that time. Glasses were over the bin submerged in water. Lady defendant said "No, No." when Redman took bottle out of bin. Defendant Matias Idoata said he was the proprietor of the place at that time and that the lady had nothing to do with it, either the place or whiskey. The place was a Spanish restaurant and rooming house.

CROSS EXAMINATION.

Did not remember the time of day when search was made. Searched six or seven other places that day. Several people in large dining room when search was made. Saw woman come out of the bedroom.

PAUL REYNOLDS was produced as a witness on behalf of plaintiff, being first duly sworn, testified as follows:

Now is and has been a federal prohibition agent for over two years. Made a search of the Casa Espanola in Burley, Idaho, on the 20th of March, 1923. The two defendants were there when he first arrived. The defendant Matias Idoata was in the dining room and witness asked him if he was the proprietor and defendant stated that he was. Told defendant that he had a search warrant for the place and after reading the warrant defendant told him to "Go ahead." When he got to kitchen

door Agent Kuchenbecker had a bottle and some glasses in his hand. Examined contents and bottle contained whiskey. Put initials on bottle and put glasses in an envelope and brought then to Boise, where they have been in a vault. That Burley was in the County of Cassia, State of Idaho.

CROSS EXAMINATION.

Described the contents of the kitchen and dining room. Saw no other women in place. Does not know Mr. Padgett.

C. B. STEUNENBERG, testified on behalf of plaintiff as follows:

Now is and has been a federal prohibition agent for three years last past located in Boise, Idaho; competent to determine alcoholic content with guagers outfit and guager's manual furnished by the Government. His test may vary up to one and a half per cent on forty or fifty per cent. Broke seal and tested Plaintiff's Exhibit I. It tested 40½ per cent alcohol by volume. Was moonshine and ordinarily used as a beverage. No cross-examination.

MR. McEVERS: We wish to offer in evidence at this time, if the Court please, Government's Exhibit 1 and Government's Exhibit 2, consisting of four whiskey glasses.

MR. HIBBARD: Your Honor, the defendants object to the introduction as evidence of Plaintiff's Exhibits I and 2, on the ground that they are in-

competent, irrelevant, and immaterial, obtained illegally, under an illegal search warrant, and should not be used as evidence in this case.

THE COURT: Overruled.

MR. HIBBARD: Also, that it would be prejudicial to the defendants, if so used.

THE COURT: Overruled. Exception allowed.

MR. McEVERS: The government rests.

MARIA URRUTIA, took the stand in her own defense and after being first duly sworn testified as follows: (The Clerk administered the oath to Mr. Hugo, the interpreter to correctly translate Spanish into English.)

Witness a married woman 54 years of age. Has one child 21 years of age. Husband a sheep herder. Did not see Mr. Redman anytime before search. Never sold any liquor at anytime. Working at the Casa Espanola for her board and room. Mrs. Idoata was sick with the flue at the time of the raid. Does not have an interest in the Casa Espanola and derives no profits therefrom.

CROSS EXAMINATION.

Has been working at the Casa Espanola for two months. Did the cooking while the wife of the defendant Matias was sick. No flour in bin where bottle was. Saw glasses in bowl with water when she first went to work in February. Has not seen anybody use glasses. Never washed these glasses.

Never asked why they were there. Knew that bottle was in bin for some time previous to the search. Grabbed the bottle for the reason that she did not know who parties were. She was told that bottle contained medicine. Never has seen anybody get a drink of liquor in the house nor has she seen Matias Idoata sell liquor to anyone.

MATIAS IDOATA, took the stand in his own behalf and after being first duly sworn testified as follows: (By use of interpreter). Lived at Burley for five years. Has family of wife and two children. Owns Casa Espanola and is a kind of a field boss for the Amalgamated Sugar Company at Burley. Has known the defendant Maria Urrutia for several years and she has stayed at his house working for her board and room for about two months. Does not know Mr. Redman and never saw him prior to March 20th, 1923. Does not know Mr. Padgett. Owns glasses and has had them in his possession for four or five years. Put glasses and bottle in cabinet. Wife got the flu about 13th of March. Bought liquor from a Mexican and gave to wife with raw eggs and milk. Had no liquor in his possession prior to the time his wife got the flu. Does not divide the profits with the defendant Maria Urrutia. Did not sell any liquor out of Plaintiff's Exhibit 1, or any other bottle, at any time. There are twelve rooms in the Casa Espanola. Number of boarders vary to as big as sixty.

A man and his son were with him at the time Mr. Reynolds served the search warrant. There are usually other men and women in and around his place. Wife in bed at the time of the search in a room leading from the kitchen. Has not received money from the other defendant obtained by the sale of liquor of any kind.

CROSS EXAMINATION.

(By MR. McEVERS):

Wife began to feel symptoms of the flu on 13th and went to bed on 16th or 17th of March. She would get up for two or three hours at a time and then go back to bed, may have been up on the 17th. Bought bottle on the 13th of March, from a Mexican boy whose name he does not know. Had seen him three or four times before. This was the only bottle witness purchased. Started to give wife liquor out of this bottle on 14th mixed with milk and eggs. Gave it to her whenever she felt sick, once a day or once every two days, or twice a day, from the 14th to the 20th. Gave from a tablespoon to a whiskey glass full at a time. Used glasses to give the kids medicine, used one at a time. Does not know who put glasses in the bowl of water. Never sold liquor or authorized anyone to sell liquor at his place. Did not see Redman until the 20th. Occupation is boss of sugar crew and acted as field boss on several occasions. Runs Casa Espanola and takes people to the factory and fields

in a car. Has run house for about five years. Wife and employed help do the cooking. In the winter he boards people who work with the sheep. He has not been in the employ of the Sugar Company at all.

HARRY WINTER, produced as a witness on behalf of defendants, being first duly sworn, testified as follows:

Has lived in Burley for about fourteen years. Operates the light and power company, a local oil and gas company and owns some farms. Known the defendant Matias Idoata about four years. Has seen the defendant hauling Mexicans from one ranch to another and placing them and telling them what to do. Knows the general reputation of the defendant Matias Idoata for truth and veracity to be first class.

CROSS EXAMINATION.

If he knew a man to be in the bootlegging business he would not consider his reputation for truth and veracity to be good. Has no recollection of telling Mr. McEvers that he knew to a moral certainty that the defendant was engaged in the bootlegging business at the Casa Espanola. Talked with Mr. McEvers in said party's office about the case. If he made the remark he did not mean to convey the impression that the defendant was dealing in liquor. One of the defendant's bondsmen.

O. V. OSLER, produced on behalf of the defendants, being first duly sworn, testified as follows:

Lives in Boise at the present time, but formerly lived in Burley for a period of about eight years, until coming here, about two months ago. Drug clerk while in Burley. Known the defendant Matias Idoata for the last three or four years. Knows the general reputation of the defendant Matias for truth and veracity to be good. Defendant's credit was unlimited.

CROSS EXAMINATION.

Based his answer as to the reputation of the defendant on the fact that defendant always paid his bills.

By MR. HIBBARD: The defense rests.

By MR. McEVERS: The government rests.

After the Court instructed the jury, the jury thereupon retired to consider their verdict and returned into the Court a verdict finding the defendant Maria Urrutia not guilty on each of the four counts contained in the information and the defendant Matias Idoata guilty on each of the two remaining counts contained in the information.

And now in furtherance of justice and that right may be done, the defendant, Matias Idoata, through his counsel, tenders and presents the foregoing as his bill of exceptions in this case, to the action of the Court, and prays that the same may be settled

and allowed and signed and sealed by the Court.

ROBT. HIBBARD,
Attorney for Defendant.

Service of the foregoing Bill of Exceptions admitted and acknowledged by receipt of a copy thereof this 11th day of May, 1923.

JOHN H. McEVERS,
Asst. U. S. Attorney.

The foregoing is duly settled and allowed as the defendant's Bill of Exceptions No. 2, this 12th day of May, 1923.

FRANK S. DIETRICH,
Judge of District Court.

Endorsed, Filed May 12, 1923,
W. D. McREYNOLDS, Clerk.

(Title of Court and Cause.)

No. 971.

PETITION FOR WRIT OF ERROR.

Comes now Matias Idoata, the defendant herein, and complains and says that on or about the 25th day of April, 1923, this Court entered judgment and sentence herein in favor of the plaintiff and against the defendant, in which judgment and proceedings had prior thereunto in this cause certain errors were committed, to the prejudice of this defendant, all of which and more in detail appear from the assignment of error which is filed with this petition.

WHEREFORE, this defendant prays that a writ of error may issue in his behalf out of this Court or out of the United States Circuit Court of Appeals for the Ninth Circuit for the correction of errors so complained of and that a transcript of the record, proceedings and papers in this cause duly authenticated, may be sent to the Clerk of the Circuit Court of Appeals of the Ninth Circuit.

ROBT. HIBBARD,
Attorney for Defendant.
Residence, Boise, Idaho.

Endorsed, Filed May 12, 1923,
W. D. McREYNOLDS, Clerk.

(Title of Court and Cause.)

No. 971.

ASSIGNMENT OF ERROR.

Now comes the defendant, Matias Idoata, in the above entitled action and in connection with his petition for a writ of error, makes the following assignment of errors, which he avers occurred in connection with and upon the trial of the above entitled cause, to-wit:

I.

That the United States District Court for the Southern Division, District of Idaho, erred in overruling the defendant's petition on file herein, petitioning for an order of the Court restraining the use as evidence of certain property seized under

that certain illegal search warrant issued by United States Commissioner John Jackson to Elias Marsters, Prohibition Director for Idaho., upon the affidavit of Paul E. Reynolds. That said search warrant was faulty for the following reasons:

A. That the affidavit upon which the search warrant was based was insufficient in that it did not set out facts upon which the affiant based his belief and information as required by law. It merely stated, "that the said Paul E. Reynolds has been informed by a reliable party, whose name affiant does not care to disclose, that the said party has seen intoxicating liquors possessed and sold by the said Mexican at the Casa Espanola on the premises described above."

B. That the affidavit for said search warrant did not describe the property to be seized as required by law inasmuch as it merely stated "there is located certain property, to-wit: whiskey, beer and other intoxicating liquors, etc".

2.

That the Court erred in the admission of evidence offered by plaintiff in the following instances, to-wit:

A. In admitting the evidence of R. F. Redman when he testified that he, in company with Mr. Reynolds and Mr. Kuchenbecker, on March 20th, 1923, made a search by authority of the above entitled search warrant, of the defendant's dwelling

known as the Casa Espanola, and located in Burley, Cassia Counnty, Idaho. Also, in allowing this witness to testify that he saw the defendants there at that time and that they found and seized a bottle of whiskey and four whiskey glasses and took them from said place notwithstanding the protests of the defendants and in allowing the witness to testify that Plaintiff's Exhibits 1 and 2, were found on that day and at that time.

B. In admitting the evidence of O. E. Kuchenbecker to the effect that under the authority of a search warrant, he participated in a search of the defendant's premises on March 20th, 1923, and at said time found a bottle containing moonshine whiskey and four whiskey glasses which he identified as Plaintiff's Exhibits No. 1 and 2.

C. In admitting the evidence of Paul Reynolds, Federal Prohibition Agent, to the effect that he conducted a search of the Casa Espanola in Burley, Idaho, on March 20th, 1923, and at that time and at said place Plaintiff's Exhibits No. 1 and 2, were found and seized.

D. In admitting the evidence of C. B. Steunenberg to the effect that Plaintiff's Exhibit No. 1, contained 40½ per cent alcohol by volume.

E. In admitting Plaintiff's Exhibits No. 1 and 2, as evidence in the above entitled cause.

3.

That the Court erred in rendering and entering

judgment against the defendant on each one of the two counts conntained in the information for the following reasons:

A. The legal evidence was insufficient to sustain the judgment rendered and entered on each count.

WHEREFORE, defendant prays that the judgment of the District Court may be reversed.

ROBT. HIBBARD,
Attorney for Defendant.
Residence, Boise, Idaho.

Service acknowledged this 1st day of May, 1923.

E. G. DAVIS,
U. S. Attorney.
J. H. McEVERS,
Asst. U. S. Attorney.
McKEEN F. MORROW,
Asst. U. S. Attorney.

Endorsed, Filed May 12, 1923,
W. D. McREYNOLDS, Clerk.

(Title of Court and Cause.)

No. 971.

ORDER GRANTING WRIT OF ERROR.

On motion of Robert Hibbard, counsel for the Matias Idoata, the above named defendant it is hereby ordered that a writ of error to the Circuit Court of Appeals of the United States, for the Ninth Circuit, from the judgment heretofore rendered and entered herein, be, and the same is here-

by granted and allowed, and that a certified transcript of the record and all proceedings be forthwith transmitted to the Clerk of said Circuit Court of Appeals of the United States, for the Ninth Circuit.

It is further ordered that the said defendant be, and is hereby admitted to bail in the sum of Five Hundred ($500.00) Dollars, pending the termination of said proceedings in error, conditioned according to law, the same to act as a supersedeas or stay bond.

Dated at Boise, Idaho, this 12th day of May, 1923.

FRANK S. DIETRICH,
Judge.

Endorsed, Filed May 12, 1923,
W. D. McREYNOLDS, Clerk.

(Title of Court and Cause.)

No. 971.

PRAECIPE AND STIPULATION.

TO THE CLERK OF THE ABOVE ENTITLED COURT:

You are hereby requested to transmit in printed form to the Clerk of the United States Circuit Court of Appeals for the Ninth Judicial Circuit, those portions of the record in said cause which are specified in the annexed stipulation.

ROBT. HIBBARD,
Attorney for Defendant.

IT IS HEREBY STIPULATED, by and between the respective parties to the above entitled cause through their attorneys of record, that the following portions only of the record in said cause shall be certified by the Clerk of the above entitled Court to the United States Circuit Court of Appeals for the Ninth Judicial Circuit in response to the writ of error herein, to-wit:

1. Information.
2. Minute entry of Clerk showing plea of defendants.
3. Verdict of jury.
4. Judgment.
5. Bills of Exceptions Nos. 1 and 2.
6. This stipulation.
7. Petition for Writ of Error.
8. Assignment of Errors.
9. Writ of Error.
10. Citation.
11. Certificate of Clerk.
12. Order Granting Writ of Error.

Signed, E. G. DAVIS,
United States District Attorney, District of Idaho.
JOHN H. McEVERS,
Assistant United States District Attorney, District of Idaho.
ROBT. HIBBARD,
Attorney for Defendant.
Residence, Boise, Idaho.

Endorsed, Filed May 15, 1923,
W. D. McREYNOLDS, Clerk.

(Title of Court and Cause.)

WRIT OF ERROR.

UNITED STATES OF AMERICA,)
) ss.
Ninth Judicial District,)

The President of the United States to the Honorable Judge of the District Court of the United States for the District of Idaho, Southern Division,—GREETING:

Because of the record and proceedings, as also in the rendition of the judgment, of a plea which in the said District Court, before you, between the United States of America and Matias Idoata, defendant, a manifest error hath happened, to the great damage of the said Matias Idoata, defendant, as by his complaint appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the party aforesaid, in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at the City of San Francisco, California, in said Circuit, on the 14th day of June, 1923, A. D., in said Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid, being inspected, the said Cir-

cuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

WITNESS the Honorable William H. Taft, Chief Justice of the United States, this 12th day of May, 1923, and in the 146th year of the Independence of the United States of America.

Allowed by Frank S. Dietrich, United States District Judge.

Attest: W. D. McREYNOLDS,
Clerk of the District Court of the
(Seal) *United States, District of Idaho, Southern Division.*

Endorsed, Filed May 12, 1923,
W. D. McREYNOLDS, Clerk.

(Title of Court and Cause.)

No. 971.

CITATION.

United States of America,)
Southern Division,) ss.
District of Idaho,)

To the United States of America, the above-named Plaintiff, and E. G. Davis, Esq., United States District Attorney for the District of Idaho,— GREETING:

YOU ARE HEREBY CITED AND ADMONISHED to be and appear at a session of the United

States Circuit Court of Appeals for the Ninth Judicial Circuit, to be held in the City of San Francisco, California, in said Circuit, on the 14th day of June, 1923, pursuant to a writ of error filed in the Clerk's office of the District Court of the United States for the District of Idaho, Southern Division, wherein Matias Idoata is plaintiff in error, and the United States of America is defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

WITNESS, the Honorable F. S. Dietrich, District Judge of the United States for the District of Idaho, Southern Division, at Boise, Idaho, within said District, this 15th day of May, 1923, A. D., and the 146th year of the Independence of the United States of America.

(Signed) F. S. DIETRICH,
United States District Judge.

Attest: W. D. McREYNOLDS,
(Seal) *Clerk.*

Endorsed, Filed May 15, 1923,
W. D. McREYNOLDS, Clerk.

(Title of Court and Cause.)

No. 971.

CLERK'S CERTIFICATE.

I, W. D. McReynolds, Clerk of the District Court

of the United States for the District of Idaho, do hereby certify the foregoing transcript of pages numbered from 1 to 44, inclusive, to be full, true and correct copies of the pleadings and proceedings in the above entitled cause, and that the same together constitute the transcript of the record herein upon Writ of Error to the United States Circuit Court of Appeals for the Ninth Circuit, as requested by the praecipe filed herein.

I further certify that the cost of the record herein amounts to the sum of $53.25, and that the same has been paid by the Plaintiff in Error.

Witness my hand and the seal of said Court this 28th day of May, 1923.

W. D. McREYNOLDS,
Clerk.

(SEAL)

By Pearl E. Zanger,
Deputy.

No. 4042

IN THE

United States
Circuit Court of Appeals

For the Ninth Circuit

MATIAS IDOATA,
Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,
Defendant in Error.

BRIEF OF DEFENDANT IN ERROR.

Upon Writ of Error from the United States District Court, for the District of Idaho, Southern Division.

E. G. DAVIS,
United States District Attorney,

JOHN H. McEVERS,
Assistant United States District Attorney,
Residence, Boise, Idaho,
Attorneys for Defendant in Error.

ROBERT HIBBARD,
Present address unknown,
Attorney for Plaintiff in Error.

Filed.....

.....Clerk

Kennard-Anderson Press

No. 4042

IN THE

United States
Circuit Court of Appeals

For the Ninth Circuit

MATIAS IDOATA,
Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,
Defendant in Error.

BRIEF OF DEFENDANT IN ERROR.

Upon Writ of Error from the United States District Court, for the District of Idaho, Southern Division.

E. G. DAVIS,
United States District Attorney,

JOHN H. McEVERS,
Assistant United States District Attorney,
Residence, Boise, Idaho,
Attorneys for Defendant in Error.

ROBERT HIBBARD,
Present address unknown,
Attorney for Plaintiff in Error.

IN THE

United States
Circuit Court of Appeals

For the Ninth Circuit

MATIAS IDOATA,
Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,
Defendant in Error.

BRIEF OF DEFENDANT IN ERROR.

Upon Writ of Error from the United States District Court, for the District of Idaho, Southern Division.

STATEMENT OF THE CASE.

The defendant in this case was charged under the National Prohibition Act in four counts: One, with the possession of intoxicating liquor on the 17th day of March, 1923; Two, with the sale of intoxicating liquor on the 17th day of March, 1923; Three, with possession of intoxicating liquor on or about the 20th day of March,

1923; Four, with maintaining a nuisance. Plaintiff in Error plead guilty to counts one and three, and was by the jury found guilty on counts two and four.

The Plaintiff in Error has filed no brief in this case, and his attorney, as we understand it, has abandoned it. His present whereabouts is not known. The only possible question in this case relates to the sufficiency of the affidavit upon which the search warrant was issued. This is set out in full in the transcript (Tr. pp. 18 and 19). A hearing was held upon the petition of Plaintiff in Error praying the court to prevent the Government from using as evidence any of the property seized under the search warrant issued on the affidavit in question. This petition was denied by the trial court, and we submit that the correctness of his ruling is not fairly open to question.

Respectfully submitted,
E. G. DAVIS,
United States District Attorney,

JOHN H. McEVERS,
Assistant United States District Attorney,
Residence, Boise, Idaho,
Attorneys for Defendant in Error.

No. 4043

United States

Circuit Court of Appeals

For the Ninth Circuit.

In the Matter of MORRIS BROTHERS, INC., Bankrupt.

ALBERT C. SMITH,

Appellant,

vs.

EARL C. BRONAUGH, Trustee in Bankruptcy of the Estate of MORRIS BROTHERS, INC., Bankrupt,

Appellee.

Transcript of Record.

Upon Appeal from the United States District Court for the District of Oregon.

FILED
JUL 2 - 1923
F. D. MONCKTON,

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

No. 4043

United States

Circuit Court of Appeals

For the Ninth Circuit.

In the Matter of MORRIS BROTHERS, INC., Bankrupt.

ALBERT C. SMITH,

Appellant,

vs.

EARL C. BRONAUGH, Trustee in Bankruptcy of the Estate of MORRIS BROTHERS, INC., Bankrupt,

Appellee.

Transcript of Record.

Upon Appeal from the United States District Court for the District of Oregon.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

Page

Answer and Objections to Petition and Claim of Albert C. Smith..... 20

Assignment of Error on Appeal of Albert C. Smith 54

Bond on Appeal of Albert C. Smith..... 56

Certificate of Clerk U. S. District Court to Transcript of Record..... 120

Certificate of Judge to Statement of Evidence. 118

Certificate on Review of Order Disallowing Claim of Albert C. Smith..... 3

Citation on Appeal..... 1

Decision and Order in the Matter of the Preferred Claim of Albert C. Smith..... 27

EXHIBITS:

Exhibit "A"—Interim Certificate No. 838. 19

Names and Addresses of Attorneys of Record. 1

Opinion on Review of Order of Referee..... 39

Order Extending Time to and Including June 15, 1923, to File Record and Docket Cause. 122

Order Modifying Order of Referee in Denying the Petition of Albert C. Smith..... 51

Index.

Page

Petition and Claim of Albert C. Smith..... 4
Petition of Albert C. Smith for Appeal..... 52
Petition of Albert C. Smith for Review..... 37
Praecipe for Transcript of Record..... 119
Statement of Evidence Under Equity Rule 75. 59

TESTIMONY:

BOSWORTH 80
Cross-examination 80
Redirect Examination 107
Recross-examination 110
DE LONG 67
Cross-examination 72
SMITH, ALBERT C..... 62
WITHINGTON, GEORGE T..... 111
Cross-examination 112
Recross-examination 116

Names and Addresses of Attorneys of Record.

Mr. I. N. SMITH, Platt Building, Portland, Oregon; Mr. L. A. McNARY, Gasco Building, Portland, Oregon; and Mr. JOHN W. REYNOLDS, Northwestern Bank Building, Portland, Oregon,

For the Appellant.

Mr. J. P. WINTER, Title & Trust Building, Portland, Oregon,

For the Appellee.

Citation on Appeal.

United States of America,
District of Oregon,—ss.

To E. C. Bronaugh, Trustee in Bankruptcy of Morris Brothers, Inc., and to John P. Winter, Esq., His Attorney, GREETING:

WHEREAS, Albert C. Smith has lately appealed to the United States Circuit Court of Appeals for the Ninth Circuit from a decree rendered in the District Court of the United States for the District of Oregon, in your favor, and has given the security required by law;

You are, therefore, hereby, cited and admonished to be and appear before said United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, within thirty days from the date hereof, to show cause, if any there be, why the said decree should not be corrected, and

speedy justice should not be done to the parties in that behalf.

GIVEN under my hand, at Portland, in said District, this 16th day of August, in the year of our Lord one thousand nine hundred and twenty-two.

CHAS. E. WOLVERTON,
Judge.

State of Oregon,
County of Multnomah,—ss.

Due service of the within citation on appeal is hereby accepted in said county and state this 16th day of August, 1922, by receiving a copy thereof, duly certified to be such by John W. Reynolds, of attorneys for appellant.

J. P. WINTER,
Attorney for Trustee in Bankruptcy.

[Endorsed]: (Original). No. B—5653. United States District Court, District of Oregon. In the Matter of Morris Brothers, Inc., Bankrupt. In re Claim of Albert C. Smith. Citation on Appeal. U. S. District Court, District of Oregon. Filed Aug. 16, 1922, at 2 o'clock P. M. G. H. Marsh, Clerk. [1*]

---

*Page-number appearing at foot of page of original certified Transcript of Record.

In the District Court of the United States for the District of Oregon.

March Term, 1922.

BE IT REMEMBERED, That on the 6th day of April, 1922, there was duly filed in the District Court of the United States for the District of Oregon, the certificate of the Referee in Bankruptcy for review by the Court of the order of the Referee disallowing the claim of Albert C. Smith, in words and figures as follows, to wit: [2]

In the District Court of the United States for the District of Oregon.

In the Matter of MORRIS BROTHERS, INC., Bankrupt.

Certificate on Review of Order Disallowing Claim of Albert C. Smith.

To the Honorable District Court Above Named:

The undersigned Referee in Bankruptcy before whom the administration of said estate is pending, hereby certifies that on the 12th day of January, 1922, an order was made and entered in said cause denying to Albert C. Smith his claim, either general or preferred, against the estate of the above-named bankrupt; that thereafter the said petitioner, being aggrieved at the order so made, filed his petition for review which was allowed, and the question for decision upon said review is whether or not the order made is correct under the pleadings and proof.

The reasons for the order and principles of law applicable are fully set forth in the order and need not, in this certificate, be repeated.

I hand up with this certificate as a part thereof
The petition and claim.
The answer thereto.
The order disallowing the claim.
The petition for review.
All the pleadings and the evidence adduced before me.

Respectfully submitted,
A. M. CANNON,
Referee in Bankruptcy.

Filed April 6, 1922. G. H. Marsh, Clerk. [3]

AND AFTERWARDS, to wit, on the 6th day of April, 1922, there was duly filed in said court, with the certificate of the Referee, the claim of Albert C. Smith, in words and figures as follows, to wit: [4]

In the District Court of the United States for the District of Oregon.

IN BANKRUPTCY.

In the Matter of MORRIS BROTHERS, INC., a Corporation, Bankrupt.

Petition and Claim of Albert C. Smith.

Comes now Albert C. Smith, the petitioner, and respectfully represents to this Honorable Court and alleges:

I.

That on and prior to the 6th day of September, 1919, Morris Brothers, Inc., was a corporation, organized under the laws of the State of Oregon, and that the stockholders of the said corporation, on said 6th day of September, 1919, adopted a resolution that the said corporation be dissolved, and also adopted a resolution authorizing and directing the directors to dissolve said corporation and to sell all the assets and business thereof for a consideration of one million and 00/100 dollars ($1,000,000.00) to a new corporation of the same name to be formed, and the directors thereupon, on said day, held a meeting and adopted a resolution of dissolution of said corporation and sale of its business and assets for one million and 00/100 dollars ($1,000,000.00) to a new corporation of the same name to be organized, as directed by said resolution of the stockholders.

II.

That thereafter, a new corporation, to wit, Morris Brothers, Inc., the bankrupt above named, was organized, and on said 6th day of September, 1919, held its first meeting of stockholders; and at said meeting of stockholders it was resolved that the offer of Morris Brothers, Inc., said antecedent corporation, to sell all its assets and business to the said new corporation for one million and 00/100 dollars ($1,000,000.00) be accepted; and thereafter, on [5] the same day, the first meeting of the Board of Directors of said new corporation was held, and a resolution was by said directors

adopted approving and ratifying said action of the stockholders.

III.

That said Morris Brothers, Inc., existing previous to September 6, 1919, had a capital stock consisting of common stock only of one hundred thousand and 00/100 dollars ($100,000.00), and all of said stock at the time of said dissolution was held by Stella M. Etheridge, except one share of one hundred and 00/100 dollars ($100.00) par value held by J. L. Etheridge, one share of one hundred and 00/100 dollars ($100.00) par value held by F. S. Morris, and one share of one hundred and 00/100 dollars ($100.00) par value held by Forbes B. Pratt; and that said new corporation was organized with an authorized capital stock of one million and 00/100 dollars ($1,000,000.00), five hundred thousand and 00/100 dollars ($500,000.00) preferred stock and five hundred thousand and 00/100 dollars ($500,000.00) common stock, and that all of said stock was formally subscribed by said Stella M. Etheridge, except one share of one hundred and 00/100 dollars ($100.00) common stock which was subscribed by said Forbes B. Pratt and one share of one hundred and 00/100 dollars ($100.00) common stock which was subscribed by J. L. Etheridge.

IV.

That the dissolution of said antecedent corporation and the organization of said new corporation of the same name was a formal and apparent change only, and that in truth and in fact and in

legal effect, the persons concerned therein remained the same, and the property, obligations, assets and business thereof continued the same, and the sole effect thereof was to authorize the increase of capital stock to five hundred thousand and 00/100 dollars ($500,000.00) common stock and five hundred thousand and 00/100 dollars ($500,000.00) preferred stock; and all transactions hereinafter alleged of a date prior to September 6, 1919, refer to transactions with said antecedent corporation, and all allegations with reference to transactions subsequent to September 6, 1919, refer to [6] transactions with said reorganized corporation.

V.

That on or about the 31st day of July, 1919, said Morris Brothers, Inc., had and received money to and for the use and benefit of petitioner in the manner hereinafter more particularly stated.

VI.

That on or about the 31st day of July, 1919, said stockholders and said Morris Brothers, Inc., by its officers and agents, falsely and fraudulently represented to petitioner that said Morris Brothers, Inc., had for sale and would sell petitioner preferred stock of said Morris Brothers, Inc.; that the common stock in said corporation was paid up and was represented by cash, bonds and other property of the value of five hundred thousand and 00/100 dollars ($500,000.00), and that said preferred stock was better than municipal bonds;

that the same could be easily sold, and would pay dividends of eight per cent (8%) per annum, and that six per cent (6%) per annum would be guaranteed; and that said offer was made to him and to a few other influential customers as a special favor and opportunity, and that when the preferred stock was fully sold the paid-up capital of said corporation would be one million and 00/100 dollars ($1,000,000.00).

VII.

That petitioner believed and relied upon said representations, and that said representations were all made for the purpose of inducing petitioner to pay money to said Morris Brothers, Inc., in the attempted purchase of preferred stock, above described, and did induce petitioner, on or about the 31st day of July, 1919, to pay to said Morris Brothers, Inc., the said sum of two thousand and 00/100 dollars ($2,000.00), as evidence of which payment petitioner received interim certificate No. 838, a copy of which is hereunto [7] attached marked Exhibit "A."

VIII.

That in truth and in fact, Morris Brothers, Inc., was not, at the time of said representations to petitioner, nor at any time, a corporation of five hundred thousand and 00/100 dollars ($500,000.00) paid-up common stock, or having any amount of authorized capital stock except one hundred thousand and 00/100 dollars ($100,000.00) common stock, as above described, but in truth

and in fact, there was not and never had been more than one hundred thousand and 00/100 dollars ($100,000.00) paid up as capital stock of said Morris Brothers, Inc., nor was there any money or property representing paid-up capital or surplus or assets above its liabilities belonging to said Morris Brothers, Inc., at said time; that in truth and in fact, said preferred stock offered to petitioner was not more valuable or better or more saleable than municipal bonds, nor was the same of any value whatever; that in truth and in fact, no such preferred stock was in existence, nor legally or at all authorized to be issued or subscribed.

IX.

That prior to the time of said representations to petitioner, all of said stockholders of Morris Brothers, Inc., conspired and confederated together for the purpose of permitting the withdrawal, by said Fred S. Morris, of assets of said corporation of the value of more than one hundred thousand and 00/100 dollars ($100,000.00) and more than the entire amount of paid-up capital and surplus assets then belonging to said corporation; and that said Stella M. Etheridge, in pursuance of said conspiracy and fraudulent purpose, acquired all of the capital stock of said corporation then belonging to or within the control of said Fred S. Morris, and in consideration thereof, said Fred S. Morris was, in pursuance of said conspiracy and fraudulent purpose, permitted [8] to and did withdraw and receive from the

assets of said corporation more than one hundred thousand and 00/100 dollars ($100,000.00) in value thereof, and more than the entire capital and surplus then belonging to said corporation.

X.

That at and prior to the time of said withdrawal of assets by said Fred S. Morris, the fraudulent purpose was conceived by all of said stockholders to reorganize said corporation with an authorized capital of five hundred thousand and 00/100 dollars ($500,000.00) preferred stock, and that said common stock and also said preferred stock, with the exception of a nominal amount thereof, should be subscribed by said Stella M. Etheridge and issued to her as fully paid stock without other payment of such subscriptions except the transfer of the assets of said antecedent corporation to said reorganized corporation; and in pursuance of said conspiracy and fraudulent scheme, said antecedent corporation was thereafter dissolved and said new corporation formed, and the assets of said antecedent corporation transferred to said new corporation, and all of said common stock in the new corporation subscribed by said Stella M. Etheridge except one hundred and 00/100 dollars ($100.00) thereof subscribed by Forbes B. Pratt and one hundred and 00/100 dollars ($100.00) thereof subscribed by J. L. Etheridge, and said stock was, in further pursuance of said scheme, issued to said Stella M. Etheridge as fully paid, excepting two hundred and 00/100 dollars ($200.00) thereof, as aforesaid; and in further pursuance of said fraudulent

scheme, said five hundred thousand and 00/100 dollars ($500,000.00) preferred stock was all subscribed by said Stella M. Etheridge and issued to her as fully paid and nonassessable; and that no payment of any of the said stock subscriptions was in fact made, except that said new corporation succeeded to the assets and liabilities and the business of said corporation so dissolved. [9]

XI.

That said Stella M. Etheridge did not have, at the time of subscribing said stock, nor has she had at any time since, any property or means of paying said subscriptions, either of common or preferred stock, or any part thereof; and that all of said stockholders well knew, at the time said subscription was received, that said Stella M. Etheridge was unable to pay anything thereon, and that she was insolvent; and that the subscription of said stock by said Stella M. Etheridge, she being without financial responsibility, was a part of said fraudulent scheme to reorganize said corporation on the basis of five hundred thousand and 00/100 dollars ($500,000.00) common stock and five hundred thousand and 00/100 dollars ($500,000.00) preferred stock without any actual capital whatever, except such as might be obtained by fraudulent sales of preferred stock in like manner as practiced against petitioner, as above set forth.

XII

That during a period beginning in the year 1918 and extending until the date of reorganization of

said corporation in September, 1919, purported and pretended sales of preferred stock of Morris Brothers, Inc., were made to other persons in like manner as to the petitioner, all in pursuance of the same plan and purpose, as above set forth, and that all of the sums received by said pretended sales of preferred stock were carried in a distinct account upon the books of said Morris Brothers, Inc., both prior to and after said reorganization date, including said sum of two thousand and 00/100 dollars ($2,00.00) so fraudulently obtained from the petitioner, as aforesaid; and when said new corporation had been organized and said preferred stock issued to said Stella M. Etheridge, the said Stella M. Etheridge surrendered for delivery to the petitioner and other persons fraudulently induced, as aforesaid, to become purchasers of [10] said preferred stock, sufficient shares thereof to satisfy said pretended sales; and thereupon, the said Stella M. Etheridge was given credit on the books of said corporation for the entire amount which has been received and was then standing to the credit of sales of preferred stock in said Morris Brothers, Inc., and said Stella M. Etheridge immediately received therefor, as representing the proceeds of the sales of her said preferred stock, certain bonds, to wit:

Ten thousand and 00/100 dollars ($10,000.00) par value six per cent (6%) bonds of the City of Victoria, B. C., due March 1st, 1928;

Fifteen thousand and 00/100 dollars ($15,000.00) par value six per cent (6%) bonds of the City of

Regina, Province of Saskatchewan, due March 1st, 1923;

Twenty-five thousand and 00/100 dollars ($25,000.00) par value six per cent (6%) bonds of Caribou County, Idaho, due may 1st, 1936, to May 1st, 1938;

Twenty-five thousand and 00/100 dollars ($25,000.00) par value five and one-half per cent (5½%) bonds of Teton County, Idaho, due July 1st, 1936 to July 1st, 1938;

Twenty-five thousand and 00/100 dollars ($25,000.00) par value five and one-half per cent (5½%) bonds of Clarke County, Washington;—the total value of said bonds, on the date of said transfer, to wit, on or about the 16th day of February, 1920, being one hundred two thousand, seven hundred fifty-one and 18/100 dollars ($102,751.18) including interest then accrued; and subsequent thereto, said Stella M. Etheridge exchanged said twenty-five thousand and 00/100 dollars ($25,000.00) Clarke County, Washington, bonds for twenty-five thousand and 00/100 dollars par value six per cent (6%) bonds of the city of Twin Falls, Idaho, due January 1st, 1936, said exchange being made August 21st, 1920; and the value of said Twin Falls bonds with interest then accrued was [11] twenty-five thousand two hundred eight and 32/100 dollars ($25,208.32), said value being more than covered by the value of said bonds of said Clarke County, Washington, exchanged therefor.

XIII.

That the said Stella M. Etheridge had and retained in her possession and control until the time of the appointment of the Receiver herein, all of said bonds so acquired and representing the money paid by petitioner and others defrauded in like manner by the pretended sales of preferred stock, as aforesaid, except the said bonds of Clarke County, Washington, and in lieu thereof, she so held continuously to said date of receivership herein, said bonds of Twin Falls, Idaho, and that all of said bonds so held by her to the date of receivership herein were surrendered to said receiver, and came into possession of said Trustee, and have at all times been capable of identification.

XIV.

Petitioner is informed and believes and therefore alleges, that said Trustee has sold the said twenty-five thousand and 00/100 dollars ($25,000.00) par value Teton County, Idaho, bonds and ten thousand and 00/100 dollars ($10,000.00) par value of said Twin Falls, Idaho, bonds, and that the remainder of said bonds remain undisposed of in the hands of said Trustee.

XV.

That the value of said bonds and the proceeds of sale thereof in the hands of said Trustee greatly exceeds the entire amount of the claims of petitioner and all other persons defrauded by the pretended sale of preferred stock, as aforesaid, now unsatisfied.

XVI.

That after the payment by petitioner of said two thousand and 00/100 dollars ($2,000.00) in the attempted purchase of [12] preferred stock, as aforesaid, petitioner received from Morris Brothers, Inc., payment of interest on said two thousand and 00/100 dollars ($2,000.00) at eight per cent (8%) from said 31st day of July, 1919, to the 1st day of July, 1920, said payments aggregating $146.67; that said sums were offered to petitioner under the guise of dividends on preferred stock, but that petitioner, at the time of accepting the same, had no knowledge or information of any of the facts hereinbefore set forth, nor that any of the representations made to him as aforesaid, were untrue, and that petitioner did not know or have any information of any of said facts, nor of any of said misrepresentations being untrue until a short time prior to the filing of this petition, nor until during the pendency of the above-entitled cause in bankruptcy; and that petitioner surrendered his interim certificate, aforesaid, and received in exchange a pretended certificate of preferred stock on or about the 13th day of January, 1920, but said certificate of preferred stock was also received and accepted by petitioner without any knowledge that any of said representations were untrue and without any knowledge of the facts above alleged. That said sums so pretended to be paid as dividends on the said preferred stock, were not in fact dividends; that at the time of the payment thereof, the said Morris

Brothers, Inc., was insolvent and had no earnings from which or with which to pay dividends; that such pretended dividends were paid by Morris Brothers, Inc., to petitioner to induce him to believe and he did believe therefrom, that his alleged preferred stock was of great value and was fully paid and nonassessable, and that petitioner was lulled to repose and thereby induced to forbear inquiry into the true condition of said preferred stock by such false and spurious payment of alleged and pretended dividends on such stock; that the officers of said bankrupt well knew at the time of the payment of the pretended dividends on such preferred stock, that [13] the said corporation was and at all times herein mentioned had been insolvent, and that such pretended payment of dividends was a sham and a subterfuge and was a fraud upon petitioner and others, and with such knowledge the said officers of said bankrupt, paid such pretended dividends to this petitioner to further defraud and deceive him and he was defrauded and deceived thereby.

XVII.

That this petitioner has heretofore filed his claim against said bankrupt estate as a general creditor thereof, but that said claim was presented prior to any knowledge or means of knowledge on petitioner's part of any of said facts above alleged as to the method of organization of said corporation, or as to the manner in which said pretended preferred stock was subscribed or issued, nor as to what disposition was made of the funds received

therefrom, or that said funds were traceable, or that the same, or property received therefor could be traced or identified.

XVIII.

That petitioner is ready, able and willing to do and perform whatever the Court shall deem equitable in the matter of restoration of said pretended dividends, surrender of said worthless preferred stock certificate, or otherwise.

XIX.

That no portion of said sum so paid by petitioner has been repaid, nor any interest thereon paid to him, except as above set forth; that there are no setoffs or counterclaims thereto; that no judgment has ever been recovered thereon, and that petitioner has not, nor has any person by his order or to his knowledge or belief, for his use, had or received any manner of security therefor.

WHEREFORE, petitioner prays that he be allowed his amended claim as herein set forth for the sum of two thousand and 00/100 dollars ($2,000.00), with interest at six per cent (6%) per annum [14] from the 31st day of July, 1919, subject to credit of $146.67 on said interest, that said bonds and the proceeds thereof be declared a trust fund for the payment of claims of petitioner and of others in like situation, and that petitioner be decreed and awarded a prior lien therefor upon the bonds above described and upon the proceeds of any of said bonds which may have been disposed of by said trustee in bankruptcy, and that said trustee be required to report and

disclose what disposition or sales, if any, have been made of any of said bonds above described, and the dates thereof, and the sums realized by such sales; and that said bonds and proceeds thereof, be set aside and disposed of under the direction of the court for the payment, to petitioner, of the amount of his said claim and for the payment *pro rata* of such others as shall show themselves entitled to liens thereon upon like basis with petitioner. That the trustee be directed and ordered to keep said bonds and their proceeds distinct and not to confuse or intermingle the same with general assets in the hands of said trustee. That petitioner may have such other and further relief as may be just and equitable in the premises.

ALBERT C. SMITH,
Petitioner.

I. N. SMITH,
JOHN W. REYNOLDS,
L. A. McNARY,
Attorneys for Petitioner.

State of Oregon,
County of ——,—ss.

I, Albert C. Smith, being first duly sworn, say that I am the petitioner in the foregoing petition; and that said petition is true, as I verily believe.

ALBERT C. SMITH.

Subscribed and sworn to before me this 20th day of June, 1921.

[Seal] P. H. D'ARCY,
Notary Public for Oregon.

My notarial commission expires November 18th, 1924. [15]

Exhibit "A."

MORRIS BROTHERS, INC.

INTERIM CERTIFICATE. No. 838

Portland, Oregon, August 1, 1919.

Upon the surrender of this Certificate, properly endorsed, we will deliver to Mr. Albert C. Smith or order $2,000.00—Two Thousand and no/100 Dollars—6% Morris Brothers, Inc., Preferred Stock bonds due —— optional —— 19—, —— with —— and subsequent coupons attached, if when and as said bonds are issued and delivered to us.

In the event said bonds shall not be issued and delivered to us, we will redeem this certificate for Two Thousand and no/100 Dollars ($2,000.00), and the interest which would have accrued on the bond since August 1st, 1919, but such interest will cease thirty days after we transmit notice to the above-named holder that the bonds will not be issued.

[Seal] By JOHN L. ETHERIDGE,
Treasurer.

State of Oregon,
County of Multnomah,—ss.

Due service of the within petition and claim of Albert C. Smith is hereby accepted in Multnomah County, Oregon, this —— day of June, 1921, by receiving a copy thereof, duly certified to as such

by John W. Reynolds, one of the attorneys for petitioner.

J. P. WINTER,
Attorney for Trustee.

Filed June 21, 1921. A. M. Cannon, Referee in Bankruptcy. Filed April 6, 1922. G. H. Marsh, Clerk. [16]

AND AFTERWARDS, to wit, on the 6th day of April, 1922, there was duly filed in said court, with the certificate of the Referee, an answer and objections by the Trustee to the claim of Albert C. Smith, in words and figures as follows, to wit: [17]

In the District Court of the United States for the District of Oregon.

B—5653.

In the Matter of MORRIS BROTHERS, INC., a Corporation, Bankrupt.

Answer and Objections to Petition and Claim of Albert C. Smith.

Comes now Earl C. Bronaugh, the duly elected, qualified and acting Trustee of Morris Brothers, Inc., a corporation, bankrupt, and for an answer and objections to the petition of Albert C. Smith filed herein, and on information and belief, admits, denies and alleges:

I.

Admits the allegations contained in Paragraphs I, II, and III of said petition.

II.

Denies any knowledge or information sufficient to form a belief of the allegations contained in Paragraphs IV, V, VI, VII, VIII and IX of said petition, and therefore denies the same, excepting that the Trustee admits that on or about the 31st day of July, 1919, Albert C. Smith did pay Morris Brothers, Inc., the sum of $2,000.00, for which Morris Brothers, Inc., issued its interim Certificate No. 838, a copy of which marked Exhibit "A" is attached to said petition.

III.

Denies any knowledge or information sufficient to form a belief of the allegations contained in Paragraph X of said petition, and therefore denies the same, excepting that the Trustee admits that Stella M. Etheridge subscribed for and that there was issued to her $500,000.00 par value of the preferred stock of Morris Brothers, Inc., for which the said Morris Brothers, Inc., has not received payment. [18]

IV.

Denies any knowledge or information sufficient to form a belief of the allegations contained in Paragraphs XI, XII, XIII, XIV and XV of said petition and therefore denies the same, excepting that the Trustee admits that the divers bonds set out and referred to in said petition came

into his possession as a part of the assets of the bankrupt Estate of Morris Brothers, Inc., and are still in his possession excepting those alleged in said petition to have been sold by the Trustee.

V.

Denies any knowledge or information sufficient to form a belief of the allegations contained in Paragraph XVI of said petition, and therefore denies the same, excepting that the Trustee admits that Morris Brothers, Inc., made payments aggregating $146.67 to the said Albert C. Smith, and that there was issued to the said Albert C. Smith $2,000.00 par value of the preferred stock of Morris Brothers, Inc., and that the said Albert C. Smith is now the owner and record holder of said $2,000.00 par value of the said preferred stock of Morris Brothers, Inc.

VI.

Denies any knowledge or information sufficient to form a belief of the allegations contained in Paragraphs XVII, XVIII and XIX of said petition and therefore denies the same.

The Trustee further answering said petition and for further objections thereto, and for a further and separate defense thereto, and on information and belief, alleges:

I.

That some time prior to the 13th day of January, 1920, Stella M. Etheridge subscribed for and was the owner and record holder of all of the preferred stock of Morris Brothers, Inc., which said

preferred stock subscribed for by the said Stella M. Etheridge [19] had not on the said 13th day of January, 1920, been paid for by her and has not since the said 13th day of January, 1920, been paid for by the said Stella M. Etheridge.

II.

That on or about the said 13th day of January, 1920, the said Stella M. Etheridge transferred and assigned $2,000.00 par value of said preferred stock to Albert C. Smith the petitioner herein, who is now the owner and record holder of said $2,000.00 par value of said preferred stock.

III.

That said $2,000.00 par value of said preferred stock so transferred and so assigned to the said Albert C. Smith by the said Stella M. Etheridge has never been paid for, unless it be determined by this Court at a hearing on said petition, that the $2,000.00 paid Morris Brothers, Inc., on or about the 31st day of July, 1919, by the said Albert C. Smith, as in said petition alleged, has in fact actually accrued to the use and benefit of Morris Brothers, Inc., and in payment for the said $2,000.00 par value of said preferred stock so transferred and assigned to the said Albert C. Smith by the said Stella M. Etheridge as hereinbefore set out.

IV.

That the Trustee is entitled to an order of this Court determining and fixing the amount due the bankrupt Estate of Morris Brothers, Inc., by the

said Albert C. Smith on account of said $2,000.00 par value of the said preferred stock of Morris Brothers, Inc., so transferred and assigned to the said Albert C. Smith by the said Stella M. Etheridge, and the Trustee alleges that the sum of $2,000.00 together with interest thereon, is now due, owing and unpaid the bankrupt Estate of Morris Brothers, Inc., by the said Albert C. Smith, on account thereof, and that the Trustee is entitled to a further order of this Court refusing to permit the said Albert C. Smith to prove [20] any alleged claim against the bankrupt Estate of Morris Brothers, Inc., until he has paid to the Trustee the said sum of $2,000.00, together with interest thereon, which is now due, owing and unpaid the bankrupt Estate of Morris Brothers, Inc., by the said Albert C. Smith, on account of said unpaid stock subscription, as hereinbefore set out.

V.

That if this Court determines at a hearing on said petition, that the said $2,000.00 par value of the said preferred stock of Morris Brothers, Inc., so transferred and assigned to the said Albert C. Smith by the said Stella M. Etheridge, has in fact been paid for by the said $2,000.00 so paid Morris Brothers, Inc., by the said Albert C. Smith, as hereinbefore set out, the Trustee alleges that the said Albert C. Smith has no claim of any sort against the bankrupt Estate of Morris Brothers, Inc., neither a general claim, a priority claim, nor a claim for or against the specific property set out and referred to in said petition.

VI.

That if this Court determines at a hearing on said petition that the said $2,000.00 par value of the said preferred stock of Morris Brothers, Inc., so transferred and assigned to the said Albert C. Smith by the said Stella M. Etheridge, has not in fact been paid for by the said $2,000.00 so paid Morris Brothers, Inc., by the said Albert C. Smith, as hereinbefore set out, the Trustee alleges that any claim, if any, either a general claim, a priority claim, or a claim for or against the specific property set out and referred to in said petition, which the said Albert C. Smith might be able to prove against the bankrupt Estate of Morris Brothers, Inc., would be exactly offset by the claim of the Trustee against the said Albert C. Smith, on account of the said sum of $2,000.00, together with interest thereon, alleged to be now due, owing and unpaid the bankrupt Estate of Morris Brothers, Inc., by the said [21] Albert C. Smith, on account of said unpaid stock subscription, owing on said $2,000.00 par value of the said preferred stock of Morris Brothers, Inc., so transferred and assigned to the said Albert C. Smith by the said Stella M. Etheridge.

WHEREFORE, the Trustee prays for an order dismissing the petition of the claimant herein, and for a further order disallowing any claim of the petitioner, Albert C. Smith, against the bankrupt Estate of Morris Brothers, Inc., growing out of his purchase of any of the preferred stock of

said corporation, and that any such claim on file herein be expunged from the list of claims upon the record in this bankruptcy matter.

EARL C. BRONAUGH,
Trustee.

M. F. DOLPH,
Of Attorneys for the Trustee,
317 Mohawk Bldg.,
Portland, Oregon.

United States of America,
District and State of Oregon,
County of Multnomah,—ss.

Earl C. Bronaugh, being first duly sworn, deposes and says that he is the duly elected, qualified and acting trustee of Morris Brothers, Inc., a corporation, bankrupt; that he has read the foregoing answer, and knows the contents thereof; that the same is true of his own knowledge, except as to matters therein stated on information and belief and as to those matters he believes it to be true.

EARL C. BRONAUGH.

Subscribed and sworn to before me this 1st day of September, 1921.

[Seal] ALICE AGLER,
Notary Public for the State of Oregon.

My commission expires November 4, 1923. [22]

District of Oregon,
County of Multnomah,—ss.

Due service of the within answer and objections

is hereby accepted in Multnomah County, Oregon, this 1st day of September, 1921, by receiving a copy thereof, duly certified to as such by M. F. Dolph, Attorney for Trustee.

I. N. SMITH,
Of Attorneys for Petitioner.

Filed Sept. 14, 1921. A. M. Cannon, Referee in Bankruptcy.

Filed April 6, 1922. G. H. Marsh, Clerk. [23]

AND AFTERWARDS, to wit, on the 6th day of April, 1922, there was duly filed in said court, with the certificate of the Referee, the order of the Referee disallowing claim of Albert C. Smith, in words and figures as follows, to wit: [24]

In the District Court of the United States for the District of Oregon.

In the Matter of MORRIS BROTHERS, INC., Bankrupt.

Decision and Order in the Matter of the Preferred Claim of Albert C. Smith.

The claimant seeks by petition to have his status as a preferred claimant adjudged by the Court upon the following state of facts:

In July, 1919, Smith was solicited by an agent of Morris Brothers to purchase preferred stock of the corporation. At that time Morris Brothers

was a corporation with an authorized capital of $100,000 common stock only, and without power to sell or issue preferred stock. It was, however, represented to this claimant that the corporation had an authorized capital of $1,000,000, $500,000 of which was common stock and $500,000 preferred; that the common stock of the corporation was fully paid up with cash, bonds or other securities paid in or on hand to represent the same. Believing the representations so made, claimant agreed to purchase $2,000 of this preferred stock. He paid the corporation $2,000 in cash or property and thereupon an interim certificate was issued to him by which Morris Brothers agreed either to issue to him $2,000 preferred stock or repay to him his money. The stock was not issued to him at this time. All these representations were false and are admitted by the trustee to have been.

In September, 1919, a new corporation was formed under identically the same name with an authorized capital of $1,000,000, $500,000 common stock and $500,000 preferred; all, or substantially all, of this stock having been subscribed by one of the stockholders of the old corporation. That institution went through the form of transferring to the new corporation all of its assets in payment of the stock so subscribed and thereupon the stock of the [25] new corporation, both preferred and common, was issued to Stella M. Etheridge, who had subscribed for the same, she being the wife of John L. Etheridge, president and manager of the

old corporation. There was issued to John L. Etheridge and one Pratt sufficient of this stock to qualified them as stockholders and officers of the new corporation.

Some time later Stella M. Etheridge surrendered to the new corporation a considerable portion of the preferred stock issued to her, and thereafter the said corporation proceeded to sell the same and to issue the shares that had been previously purchased by Smith and other persons. Smith's shares were issued to him in July, 1920.

It is also an admitted fact that during all of this time both the old corporation and the new corporation were insolvent and the new corporation was in a continuous state of insolvency from the time of its organization to the date of its adjudication in bankruptcy; also that subsequent both to the time Smith made his purchase and to the time the stock was issued to him the new corporation accumulated obligations in a large amount, totaling at the date of adjudication more than $1,500,000, claims for which, general and preferred, have been filed in this court. The assets are far from sufficient to pay said claims in full.

The stock issued to Smith, together with dividends thereon, was accepted and retained by him at the date of adjudication, but it seems to be undisputed that he knew nothing of these practices of the corporation until they were discovered after the failure. Other preferred stockholders to the amount of $64,500 are in the same predicament and making the same claim against the trustee.

The old corporation and the new will be regarded as one and the same in this contest. Equity is concerned with substance [26] and not form. The old corporation being insolvent, its alleged dissolution, the filing of new articles by the same officers, directors and stockholders under identically the same name and the attempted transfer of assets was all an empty form which in equity cannot be regarded as having any greater significance than the filing of supplemental articles authorizing the issuance of preferred and common stock. With respect to the rights of Smith or any other creditor the supposed dissolution did not, in equity, occur. No advantage accrued to the corporation thereby over Smith and none to Smith over the corporation, for it seems obvious that Smith could, in a court of equity, at any time have compelled the new Morris Brothers corporation to conduct itself in strict conformance to the contract theretofore made with him by the same identical interests. There would in such case be a clear application of estoppel *in pais* operating against the corporation. If this were not the case it might be said that claimant's remedy would be against the old corporation entirely.

For this reason, the subscription having been made, the money paid, and the stock subsequently authorized, issued and accepted, the inquiry is whether it is correct to say the transaction was wholly void, either because of any question of *ultra vires* or because of the deception practiced upon the claimant. The transaction itself was

unquestionably voidable at his suit against the corporation, but did he, or does he now, hold stock that is wholly void? To take the view that he does require a holding that he never at any time acquired the status of a stockholder and could have been denied, even by the corporation itself, participation in any of the dividends declared and payable upon preferred stock.

The correct solution of what Smith's rights and liabilities would be in a suit by the trustee to collect on his subscription [27] or contract with the corporation, assuming he had not paid before bankruptcy, ought accurately to determine what his rights are now as an alleged preferred claimant in the circumstances detailed in his claim. In other words, the prime question, above all others, is did Smith become a stockholder in the corporation at all? And it seems to me an entirely reasonable conclusion that as appertains to the corporation and its stockholders they have never been in position, since the increase of its capital stock, to hold back and resist this contract on the ground of *ultra vires.* By the increase of its capital stock the corporation acquired the power to perform and became obliged to do so, albeit at Smith's option only. This, indeed, it did by issuing and delivering the stock and paying dividends to Smith. No person, therefore, other than Smith is now in position to question his standing as a preferred stockholder in this corporation. Is Smith in such position?

On principle it would appear that unless the right to evade or repudiate the contract be reciprocal it does not exist, for it cannot happen that a contract at its inception is legal and binding as to one of the parties to it and illegal and void as to the other. Circumstances may arise to justify the release of one of the parties to a contract from performance, but this does not involve the truth that there is an abysmal distinction between a merely voidable and utterly void contract. Smith's contentions proceed upon the ground that he is not and never was bound in the premises because the contract was both fraudulent and void. In so far as the fraud is concerned he falls into fundamental error. That the purchase was induced by fraudulent representations must be conceded, but that misadventure cannot avail him anything as against the trustee in this proceeding. If fraud be the only infirmity that inheres then the trustee would be empowered to sue him in the courts and recover any balance due from [28] him to the corporation upon the contract, if there were an unpaid balance, and he could not set up as a defense the censurable conduct of those who misled him. Such is the general rule and it is the rule in this state.

Falco vs. Kaupisch Creamery Co., 42 Or. 442;
Sargent vs. American Bank & Trust Co., 80 Or. 16.

Further than this, the claimant contends that the stock issued is and was always void, and states the rule to be that:

"When a corporation takes subscriptions to unauthorized stock, such subscriptions are absolutely void, and cannot be collected against the subscriber, even though the stock is afterward authorized. If the stock be issued, it gives neither the rights nor liabilities of stockholders, and if the stock be paid for, the holder becomes a creditor for money had and received, and not a stockholder."

Citing:

14 Corpus Juris, 530;

Schierenberg vs. Stephens, 32 Mo. App. 314;

Anthony vs. Household Sewing Machine Co., 16 R. I. 571;

Scovill vs. Thayer, 105 U. S. 143;

Grangers Insurance Co. vs. Kamper, 73 Ala. 325;

Clark vs. Turner, 73 Ga. 1;

Marion Trust Company vs. Bennett, 169 Ind. 346; 82 Northeastern 782;

Kampman vs. Tarver, 87 Tex. 491;

Independent Storage Co. vs. Iowa Merc. Co., 179 N. W. 157.

Aside from the distinction that this transaction is no longer executory but has become an executed contract on both sides, an analysis of these cases does not warrant holding the stock here in question to be void. The conclusion cannot be drawn from them, or any one of them, that Smith did not take on the character, rights and liabilities of the preferred stockholder; on the contrary, there is not wanting intimation or suggestion in some of these

authorities that stock bargained for, paid for, afterward issued and accepted is good notwithstanding it was unauthorized at the time the contract was made. And there is no good reason for holding otherwise, because in this instance the bargain has been carried out exactly as made, except that the representations about the flourishing [29] condition of the corporation, its extensive and valuable assets and the alleged value of the stock proved to be grossly untrue, but which, as we have seen, can make no difference at this late day. Smith was issued preferred stock of Morris Brothers, a corporation of $1,000,000 authorized capital, $500,000 common and $500,000 preferred. That is what he agreed to buy and that is what the corporation had the ability to deliver and did deliver when delivery was actually made. There is nothing in all this that violates public policy, the sanctity of the contract with respect to Smith or the rights of other stockholders in the corporation, either common or preferred; moreover, beyond any doubt, it bound the corporation and its stockholders and consequently must have bound Smith unless he avoided the contract in an appropriate suit to rescind. It may have been, because of the fraud alleged, voidable, and doubtless was, but it was not void.

Nor do I think that Smith has traced his property. For all that appears his money may have gone anywhere but into the property now in the possession of the trustee; it may have been received and immediately paid out in due course of business; there is no showing that it was banked or

that thereupon, or at all times subsequently, the corporation had on hand such an amount to its credit. The record kept of an account designated "Morris Brothers 6's," which it is claimed related to these preferred stock transactions, was a mere bookkeeping term or device. It was buncombe, because in reality there was not such thing. And the transaction by which the corporation received from Mrs. Etheridge stock it proposed to deliver to these purchasers, in exchange for which it delivered to her negotiable bonds, was merely a manipulation of corporate assets theretofore acquired and owned by Morris Brothers, into the substance of which no attempt has been [30] made or could be made to trace Smith's money. The fact that Mrs. Etheridge, to assist in the perpetration of an alleged fraud upon Smith, fraudulently received from the corporation assets, which in equity and good conscience should have been used for the benefit of creditors and now belong to them, does not entitle Smith to those assets or impress a lien thereon in his favor unless they were originally obtained from him or constitute a definitely ascertained substitute for money obtained from him. I do not see that this has been made to appear. The Supreme Court has held in Schuyler vs. Littlefield, 232 U. S. 806, that if claimant's evidence in such a case leaves the matter of identification in doubt the doubt must be resolved in favor of the trustee, and so, the money itself being irretrievable, Smith surely has no claim upon any of the general assets of the firm

in the acquisition of which he is unable satisfactorily to show his money participated.

Certain it is that the right of a preferred stockholder to take out of the estate assets over the heads of general creditors or even to participate equally with them, must be of such strong and outstanding character as not to be involved in doubt. That is not this case.

The claim is therefore disallowed, either as general or preferred.

Dated January 12th, 1922.

A. M. CANNON,
Referee in Bankruptcy.

Filed January 12, 1922. A. M. Cannon, Referee in Bankruptcy.

Filed April 6, 1922. G. H. Marsh, Clerk. [31]

AND AFTERWARDS, to wit, on the 6th day of April, 1922, there was duly filed in said court the petition of Albert C. Smith for review of the order of the Referee disallowing claim, in words and figures as follows, to wit: [32]

In the District Court of the United States for the District of Oregon.

B—5653.

In the Matter of MORRIS BROS., INC. (a Corporation), Bankrupt.

Petition of Albert C. Smith for Review.

Comes now Albert C. Smith and by this his petition respectfully prays the above-entitled court that the decision and order entered by Honorable A. M. Cannon, Referee in the above-entitled court and cause, whereby the petition and claim of said Albert C. Smith was disallowed, and the whole of said decision and order be reviewed by the Judge of said court.

Said claimant alleges,—

That the Honorable Referee erred in not allowing said claimant a lien for the amount of said claim, as prayed in said petition, upon those certain bonds and the proceeds thereof specified in said petition, and that said Referee further erred in disallowing said claim as a valid claim against said bankrupt estate.

That the Referee erred in not holding that the purported purchase of preferred stock by plaintiff, there being no such stock authorized or in existence, was absolutely void, and further erred in holding that claimant was in fact and in law a stockholder in the above-named bankrupt corporation.

That the Referee erred in not finding that the specific bonds and the proceeds thereof, set forth in the said claim and petition, represented and constituted trust funds, *ex maleficio,* derived from fraudulent and void sales of preferred stock, and traced

into the hands of Stella M. Etheridge, thence into the hands of the trustee of said bankrupt.

ALBERT C. SMITH,
Petitioner.

I. N. SMITH,
L. A. McNARY,
JOHN W. REYNOLDS,
Attorneys for Petitioner. [33]

United States of America,
District and State of Oregon,
County of Marion.—ss.

I, Albert C. Smith, being first duly sworn, say that I am the petitioner in the foregoing petition, and that the statements therein contained are true, as I verily believe.

[Seal] ALBERT C. SMITH.

Subscribed and sworn to before me this 28th day of January, 1922.

ROLLIN K. PAGE,
Notary Public for Oregon.

My commission expires January 25, 1924.

State of Oregon,
County of Multnomah,—ss.

Due service of the within petition is hereby accepted in Multnomah County, Oregon, this 30th day of January, 1922, by receiving a copy thereof, duly certified to as such by John W. Reynolds, one of the attorneys for petitioner.

J. P. WINTER,
Attorney for Bankrupt.

Filed Jan. 30, 1922. A. M. Cannon, Referee in Bankruptcy.

Filed April 6, 1922. G. H. Marsh, Clerk. [34]

AND AFTERWARDS, to wit, on the 3d day of July, 1922, there was duly filed in said court an opinion of the Court on review of order of Referee, in words and figures as follows, to wit: [35]

In the District Court of the United States for the District of Oregon.

B—5653.

July 3, 1922.

In the Matter of MORRIS BROS., INC., Bankrupt.

Opinion on Review of Order of Referee.

I. N. SMITH, JOHN W. REYNOLDS and L. A. McNARY, all of Portland, Oregon, for Petitioner.

J. P. WINTER, Portland, Oregon, for the Trustee.

This cause comes here on review from the Referee in Bankruptcy. His finding and decree were against the petitioner, who seeks to have his claim against the bankrupt's estate adjudged to be entitled to the status of a preferred claim.

For some two years prior to the transaction with which we are immediately concerned, Albert C.

Smith, the petitioner, had been doing business with Morris Bros. Inc., in buying and dealing in bonds. In the latter part of July, 1919, a salesman of Morris Bros. approached Smith and induced him to turn over to Morris Bros. the proceeds from certain Canadian bonds then due, which he had on deposit with the company and desired it to collect, for $2,000, par value, of its preferred stock. In order to induce Smith to purchase the stock, the salesman represented to him that Morris Bros. was doing a wonderful business, that its capital stock was all paid for, and that the preferred stock would be a fine buy; also that the stock would bear six per cent interest, plus a division of the dividends after the common stock was paid off, that $500,000 of common stock was paid up, and that a like amount of the preferred stock would be issued.

On July 31, 1919, Smith accepted an interim certificate, whereby Morris Bros. agreed to deliver to him $2,000 of preferred stock of the company. This was carried until January 13, 1920, when Morris Bros. delivered to Smith and Smith accepted, in lieu of the interim certificate, a certificate purporting to represent [36] 20 shares of preferred stock. At the time this stock was delivered Morris Bros. paid Smith $66.67, being the interest on the stock to January 1, 1920, plus 1 per cent; and, by admission in the petition, petitioner received an additional sum which, together with the $66.67, aggregated $146.67, covering interest on the stock at 8 per cent from July 31, 1919, to the 1st day of

July, 1920. Smith was the holder of the stock when Morris Bros. failed, which was about the end of 1920.

At the time Smith purchased the supposed preferred stock and the interim certificate, Morris Bros. Inc., was an incorporated entity, with an authorized capital stock of $100,000, and no more. This was common stock. The corporation was wholly unauthorized to issue preferred stock of any kind. On September 6, 1919, at a special meeting of the stockholders and by a resolution thereby adopted, the corporation was declared to be dissolved and the directors were authorized and empowered to sell its business to a new corporation, bearing the same name, for the sum of one million dollars. Steps were thereupon taken for the organization of the new corporation. Articles of incorporation were executed and filed fixing the amount of capital stock at $1,000,000 consisting of 5,000 shares of common and 5,000 shares of preferred; the latter to be without voice in the management of the concern. Stock books were opened and subscriptions were made, as follows:

S. M. Etheridge, common stock, 4998 shares; preferred, 5000 shares; amount, $999,800. Forbes B. Pratt, common stock, 1 share, amount $100; and John L. Etheridge, common stock, 1 share, amount $100.

Directors were elected and by-laws adopted. Among other things sought to be accomplished was

a transfer of the assets of the old corporation to the new at a valuation of $1,000,000; the new corporation assuming and obligating itself to pay the debts and obligations of the old. The books of the new company do not [37] appear to have been written up until January 1, 1920.

By a report of Morris Bros. Inc., made to the Corporation Commissioner at Salem, Oregon, June 30, 1920, the capital stock thereof is represented to be $1,000,000 divided into 10,000 shares at $100 per share, all issued and paid up. Presumably the stock was paid up by balancing the assets of the old company against it.

In an account with Stella M. Etheridge, it appears that she is credited with certain preferred stock, ranging in amount around $102,200, and is charged with an equal amount of bonds to offset the credit. Attempt has been made to trace the specific bonds charged to her, which are represented by sales slips indicating purchases by her from the company. She is also credited with certain bonds which would indicate a purchase by the company from her. After the failure of the concern, $75,000 of these bonds were found in Tacoma, Washington, but were returned to the trustee, and something like $25,000 found in the possession of the company itself, were turned over to the trustee. At the time of the failure, there were outstanding $64,500 in amount of the preferred stock among different persons who had purchased from the company. This includes Smith's stock.

On February 21, 1919, Morris Bros. Inc., acting through John L. Etheridge, President, drew a check on the United States National Bank, payable to the bank, for $100,000. Thereupon the bank issued its cashier's check for a like amount, and this was in turn deposited with the Forest Grove National Bank to the account of Stella M. Etheridge, and was checked out soon thereafter, $99,600 to Henrietta A. Morris and $400 to Fred S. Morris. There was also diverted to the personal account of Fred S. Morris a large amount of securities.

When Morris Bros. closed its doors, the claims of the [38] general unsecured creditors aggregated in excess of $1,824,000, the greater portion of which claims was, says the accountant, "contracted naturally in the last three or four months of business, from the first of September, 1920, on."

WOLVERTON, District Judge:

Two questions are presented for consideration: First, whether petitioner's claim is to be preferred above those of the general creditors; and, second, whether his claim is to be regarded in the light of that of a general creditor and is entitled to share equally with such creditors in the distribution of the assets of the estate.

The proceeds of the bonds which were the consideration petitioner paid for the preferred stock, as Bosworth, the accountant, testified, went into the general funds of the corporation, and were used by it in the general operation of its business. That is to say, they were not segregated or set apart

into a separate fund, but went into the common property of the concern, and were probably deposited with the United States National Bank and used for buying bonds and stocks and in paying the wages of employees, rent, etc. In other words, such proceeds did not go into a separate trust fund. Petitioner has failed utterly to trace the proceeds arising from the collection of these Canadian bonds into any specific trust fund which he is now enabled to identify.

The settled rule in this jurisdiction seems to be that claimant's right to establish his trust and recover his fund depends upon his ability to prove his property in its original or substituted form in the hands of the alleged trustee. Spokane County vs. First National Bank of Spokane, 68 Fed. 979, 982. This petitioner has been unable to do. All he can say is that the proceeds of his bonds have gone into the general business of Morris Bros. Inc. They have since probably been several times turned over. They have [39] wholly and entirely lost their identity, either in the original or substituted character, and the claim is therefore not one that can be or ought to be preferred above those of the general creditors. To a like purpose, see Schuyler vs. Littlefield, Trustee of Brown & Co., 232 U. S. 707, and In re See, 209 Fed. 172.

It is strenuously insisted, however, that the bonds that found their way into the hands of Stella M. Etheridge in exchange for certain of the preferred stock of Morris Bros., Inc., and which were eventu-

ally found in Tacoma and returned to the company, constitute a segregated fund set apart and kept separate from the general property or assets of the company, and that therefore petitioner is entitled to a lien upon this fund. This contention overlooks entirely the principle upon which such a lien is predicated. These bonds that came into the hands of Stella M. Etheridge are by no means the same bonds, money or funds with which petitioner parted when he purchased the preferred stock. They were supposedly other bonds that Morris Bros. purchased or accumulated after petitioner parted with his Canadian bonds or money arising from the collection thereof, and were not that which constituted the consideration for the preferred stock that he acquired. It is not shown that the petitioner ever owned or acquired any interest in the bonds that were sold or set apart to Stella M. Etheridge, and I am aware of no principle applicable whereby he is entitled to a lien upon any of these particular bonds.

This disposes of the first contention.

Respecting the second question, it must be conceded that petitioner was induced to purchase his preferred stock through misrepresentation and fraud perpetrated by Morris Bros. Inc., its managers and agents. It is probable that the corporation was solvent immediately prior to February 21, 1919, the date when its assets were depleted by the withdrawal therefrom of $100,000 through [40] the manipulation of its president and others

concerned in the transaction. But the corporation was assuredly insolvent when petitioner purchased his preferred stock in July, 1919, and it henceforth remained insolvent until the organization of the new corporation. So was the new corporation insolvent during the entire time of its existence, or whatever existence it may be said to have had. The testimony of DeLong, the agent of Morris Bros. who sold the stock to petitioner, and who was responsible for the misrepresentations made to him and upon which he relied in making his purchase, would seem to indicate that petitioner was advised that Morris Bros. was contemplating a reorganization of the corporation and an increase of its capital stock. Among other things, DeLong testified:

> "I approached him (petitioner) and told him that the company was reorganizing, that they were expanding and increasing their business inasmuch as they expected to have additional capital. * * * I told him—I went into details with this preferred stock, told him there would be so much issued, and so on. * * * It was about the time I learned of the million dollar corporation, and I think that I told him about that. * * * At that time there had been something over $80,000 worth sold, maybe more. Q. Did you tell Mr. Smith that you had sold $80,000? A. Now, I must have told him. I would think that I did tell him. * * * Q. You told him they expected

to sell about half a million dollar's worth of preferred stock? A. That was the issue."

There can scarcely be a doubt that Morris Bros. was depending upon a reorganization of the corporation for authority to sell preferred stock. It had no such authority under the original organization, and the fact of the issuance of the interim certificate is strongly evidentiary of its purpose to promote reorganization with a view to acquiring authority to issue preferred stock. If the corporation had had the authority, it is likely it would [41] have issued the stock at once.

It is immaterial whether the reorganization was regularly formed or not, or whether it was a strictly legal entity, authorized and empowered to issue the preferred stock or to transact the business which it represented it was to engage in. It is sufficient to know that it was the second entity that was thrown into bankruptcy, that it is that entity whose assets are being now administered in the court, and it is that entity from which petitioner is holding his preferred stock and against the assets of which he is prosecuting his claim. It would, therefore, be of little avail to attempt to discuss the legality of the second so-called corporate organization. It will scarcely be questioned that the new entity, whether legally organized or not, is estopped to deny the legality of the issuance of petitioner's preferred stock. So also would it be estopped to deny its entity if proceeded against as for money had and received because of

the acquirement of petitioner's funds through misrepresentation and deceit.

The regular procedure, however, by which to recover in such a case, as for money had and received is by repudiation of the stock purchase, accompanied by notice of rescission and an offer to return whatever of value has been received by the purchaser, in order to place the corporation *in statu quo*. 14 C. J. 592. That has not been done in the case at bar. The petitioner has simply presented his claim against the estate, accompanied with a declaration of willingness on his part to do and perform whatever the Court shall deem equitable in the matter of restoration of dividends paid on the stock and received by him. However, as it is not apparent that petitioner had knowledge of the alleged fraud or the insolvent condition of the corporation prior to its collapse, and as there has been interposed no technical insistence [42] upon a strict compliance with the practice, the matter will be laid aside, and the cause determined upon its merits.

The crucial question here presented is whether, under the facts as deducible from the evidence, the petitioner is entitled to have his claim adjudicated as one on a par with the general creditors.

The rule that should govern in a case of this character has been clearly and concisely stated, together with elaboration of the reasons that induced its promulgation, in Newton Nat. Bank vs. Newbegin, 74 Fed. 135, 140, from which I quote:

"There are obvious reasons why a shareholder of a corporation should not be released from his subscription to its capital stock after the insolvency of the company, and particularly after a proceeding has been inaugurated to liquidate its affairs, unless the case is one in which the stockholder has exercised due diligence, and in which no facts exist upon which corporate creditors can reasonably predicate an estoppel. When a corporation becomes bankrupt, the temptation to lay aside the garb of a stockholder, on one pretense or another, and to assume the role of a creditor, is very strong, and all attempts of that kind should be viewed with suspicion. If a considerable period of time has elapsed since the subscription was made; if the subscriber has actively participated in the management of the affairs of the corporation; if there has been any want of diligence on the part of the stockholder, either in discovering the alleged fraud, or in taking steps to rescind when the fraud was discovered; and, above all, if any considerable amount of corporate indebtedness has been created since the subscription was made, which is outstanding and unpaid,—in all of these cases the right to rescind should be denied, where the attempt is not made until the corporation becomes insolvent. But if none of these conditions exist, and the proof of the alleged fraud is clear, we think that a stockholder should be permitted to rescind his sub-

scription as well after as before the company ceases to be a going concern."

See, also, Wallace vs. Bacon, 86 Fed. 553, and Lantry vs. Wallace, 97 Fed. 865.

Now, pursuing the thought as expressed by these authorities, and applying it here, it appears that practically a year and a half expired from the time petitioner purchased his stock to the time the corporation failed—a considerable period. Presumably, petitioner dealt more or less with the corporation in [43] the meanwhile. But, being misled and without knowledge of the fraud or the insolvent condition of the concern, this fact alone ought not to bar him from insisting upon his claim. Nor do I find want of diligence on petitioner's part, either in discovering the fraud or in taking steps to right the wrong, although it is probable that he was aware of the contemplated reorganization of the corporation in order to authorize issuance of preferred stock. It is, however, a fact satisfactorily proven that practically all the large indebtedness of the company now outstanding was created since petitioner obtained his interim certificate, and even since his certificate of stock was delivered to him and the interim surrendered. Under such conditions, and in pursuance of the rule, the general creditors have the superior equity.

The petitioner's claim will be allowed, but will be subordinated to the payment in full of the claims of the general creditors.

Filed July 3, 1922. G. H. Marsh, Clerk. [44]

AND AFTERWARDS, to wit, on the 7th day of August, 1922, there was duly filed in said court, an order of Court on review of the order of the Referee disallowing claim, in words and figures as follows, to wit: [45]

In the District Court of the United States for the District of Oregon.

No. B—5653.

July 3, 1922.

In the Matter of MORRIS BROTHERS, INC., Bankrupt.

Order Modifying Order of Referee in Denying the Petition of Albert C. Smith.

This cause was heard by the Court upon review of the Order of A. M. Cannon, Referee in Bankruptcy herein, denying the petition and claim of Albert C. Smith for $2,000.00 and interest filed herein, the petitioner and claimant appearing by Messrs I. N. Smith, John W. Reynolds and L. A. McNary of counsel and the trustee of the bankrupt appearing by Mr. John P. Winter.

On consideration whereof it is now ordered and adjudged that the order of the Referee in disallowing and denying the claim of the petitioner as a preferred claim is hereby affirmed.

And it is further ordered, however, that the order of the said Referee in disallowing said claim entirely be and the same is hereby modified, and it is

ordered and adjudged that the petitioner's claim in the sum of $2,000.00, with interest thereon from the 31st day of July, 1919, at the rate of 6% per annum, less $146.67 be allowed, subject, however, first—to the payment in full of the claims of general creditors and all other claims filed and allowed against said estate, excepting only those of the nature of petitioner's claim, and it is further ordered that no part of petitioner's claim be paid until said other claims have been paid in full.

CHAS. E. WOLVERTON,
Judge.

Filed August 7, 1922. G. H. Marsh, Clerk. [46]

AND AFTERWARDS, to wit, on the 15th day of August, 1922, there was duly filed in said court, a petition of Albert C. Smith for appeal, in words and figures as follows, to wit: [47]

In the District Court of the United States for the District of Oregon.

IN BANKRUPTCY—No. B—5653.

In the Matter of MORRIS BROTHERS, INC., Bankrupt.

Petition of Albert C. Smith for Appeal.

To the Honorable C. E. WOLVERTON, District Judge.

The above-named Albert C. Smith, claimant and

petitioner, feeling aggrieved by the decree rendered and entered in the above-entitled cause in reference to his claim and petition on the 7th day of August, A. D. 1922, does hereby appeal from said decree to the Circuit Court of Appeals for the Ninth Circuit, for the reasons set forth in the assignment of errors filed herewith, and he prays that his appeal be allowed and that citation be issued, as provided by law, and that a transcript of the record, proceedings and documents upon which said decree was based, duly authenticated, be sent to the United States Circuit Court of Appeals for the Ninth Circuit under the rules of such court in such cases made and provided.

And your petitioner further prays that the proper order relating to the required security to be required of him be made.

I. N. SMITH,
L. A. McNARY and
JOHN W. REYNOLDS,
Attorneys for Petitioner.

Appeal allowed on giving bond as required by law for the sum of $1,000.00.

Dated August 15, 1922.

CHAS. E. WOLVERTON,
Judge.

Petition of Albert C. Smith for appeal.

State of Oregon,
County of Multnomah,—ss.

Due service of the within petition of Albert C. Smith for appeal is hereby accepted in Multnomah County, Oregon, this 15th day of August, 1922, by receiving a copy thereof, duly certified to as such by John W. Reynolds, one of the attorneys for Albert C. Smith.

J. P. WINTER,
Attorney for E. C. Bronaugh, Trustee in Bankruptcy.

Filed August 15, 1922. G. H. Marsh, Clerk. [48]

AND AFTERWARDS, to wit, on the 15th day of August, 1922, there was duly filed in said court an assignment of errors, in words and figures as follows, to wit: [49]

In the District Court of the United States for the District of Oregon.

IN BANKRUPTCY—No. B—5653.

In the Matter of MORRIS BROTHERS, INC., Bankrupt.

Assignment of Errors on Appeal of Albert C. Smith.

Comes now Albert C. Smith, claimant and petitioner in the above-entitled cause, and files the following assignment of errors, upon which he

will rely upon his prosecution of his appeal in the above-entitled cause from the decree made by this Honorable Court on the 7th day of August, 1922.

I.

That the United States District Court for the District of Oregon erred in not decreeing to claimant a lien for the amount of his claim against and upon the specific assets or proceeds thereof described in his claim and petition as prayed for by said claimant, and in affirming the Referee's order denying such lien.

II.

That the United States District Court for the District of Oregon erred in decreeing that the claim allowed petitioner be subordinated to the payment in full of the claims of general creditors.

WHEREUPON, appellant prays that said decree be modified, and that said District Court for the District of Oregon be ordered to enter a decree awarding appellant's claim without discrimination against appellant in favor of any claim not given priority by the bankruptcy law, and that said District Court for the District of Oregon be further ordered to enter a decree awarding a lien in favor of appellant for the amount of his claim against the specific assets prayed for in said claim and petition.

I. N. SMITH,
L. A. McNARY and
JOHN W. REYNOLDS,
Attorneys for Appellant.

Assignment of Errors on Appeal of Albert C. Smith.

State of Oregon,
County of Multnomah,—ss.

Due service of the within assignment of errors on appeal of Albert C. Smith is hereby accepted in Multnomah County, Oregon, this 15th day of August, 1922, by receiving a copy thereof, duly certified to as such by John W. Reynolds, one of the attorneys for Albert C. Smith.

J. P. WINTER,
Attorney for E. C. Bronaugh, Trustee in Bankruptcy.

Filed August 15, 1922. G. H. Marsh, Clerk. [50]

AND AFTERWARDS, to wit, on the 15th day of August, 1922, there was duly filed in said court a bond on appeal, in words and figures as follows, to wit: [51]

In the District Court of the United States for the District of Oregon.

IN BANKRUPTCY—No. B—5653.

In the Matter of MORRIS BROTHERS, INC., Bankrupt.

Bond on Appeal of Albert C. Smith.

KNOW ALL MEN BY THESE PRESENTS, That we, Albert C. Smith, as principal, and A. M.

Fanning, as surety, of the County of Marion, State of Oregon, are held and firmly bound unto E. C. Bronaugh, Trustee of the estate of Morris Brothers, Inc., bankrupt, in the sum of $1,000.00, lawful money of the United States, to be paid to him and his successors as such Trustee, to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and each of our heirs, executors and administrators, by these presents.

Sealed with our seals and dated this 14th day of August, 1922.

WHEREAS, the above-named Albert C. Smith is prosecuting an appeal to the United States Court of Appeals of the Ninth Circuit to modify the judgment and decree of the District Court for the District of Oregon in the above-entitled cause in reference to the claim and petition of said Albert C. Smith;

NOW, THEREFORE, the condition of this obligation is such that if the above-named Albert C. Smith shall prosecute his said appeal to effect and answer all costs if he fail to make good his appeal, then this obligation shall be void; otherwise to remain in full force and effect.

ALBERT C. SMITH,
Principal.

A. M. FANNING,
Surety.

Bond on Appeal of Albert C. Smith. [52]

State of Oregon,
County of Marion,—ss.

On the 14th day of August, 1922, personally appeared before me A. M. Fanning and Albert C. Smith, respectively, known to me to be the persons described in and who duly executed the foregoing instrument as parties thereto, and respectively acknowledged, each for himself, that they executed the same as their free act and deed for the purposes therein set forth. And the said A. M. Fanning, being by me duly sworn, says that he is a resident and householder of the County of Marion, State of Oregon, and that he is worth the sum of $2,000.00 over and above his just debts and legal liability and property exempt from execution.

A. M. FANNING.
ALBERT C. SMITH.

Subscribed and sworn to before me this 14th day of August, 1922.

[Seal] ROLLIN K. PAGE,
Notary Public for Oregon.

My commission expires Jan. 25th, 1924.

The foregoing bond is approved, both as to sufficiency and form this 15th day of August, 1922.

CHAS. E. WOLVERTON,
Judge.

Bond on Appeal of Albert C. Smith.

State of Oregon,
County of Multnomah,—ss.

Due service of the within bond on appeal of Albert C. Smith is hereby accepted in Multnomah County, Oregon, this 15th day of August, 1922, by receiving a copy thereof, duly certified to as such by John W. Reynolds, one of the attorneys for Albert C. Smith.

J. P. WINTER,
Attorney for E. C. Bronaugh, Trustee in Bankruptcy.

Filed August 15, 1922. G. H. Marsh, Clerk. [53]

AND AFTERWARDS, to wit, on the 29th day of March, 1923, there was duly filed in said court a statement of the evidence, in words and figures as follows, to wit: [54]

In the District Court of the United States for the District of Oregon.

B—5653—IN BANKRUPTCY.

APPEAL OF ALBERT C. SMITH.

In the Matter of MORRIS BROTHERS, INC., Bankrupt.

Statement of Evidence Under Equity Rule 75.

In the above cause Albert C. Smith, claimant, presented a claim against the above bankrupt,

which was a corporation organized, created and existing by virtue of the laws of Oregon, with its place of business at Portland, Multnomah County, arising from sale to him of certain preferred stock under the circumstances hereafter shown.

Smith claims that the sale was induced by fraud which he did not discover and which was concealed until after the bankruptcy of the above company.

The bankrupt is the second Morris Brothers, Inc., to be incorporated under the laws of Oregon. Its predecessor was organized under the same name and with a capital stock hereafter shown.

Some time in July, 1919, Smith was solicited by an agent of Morris Brothers, Inc.—the first corporation—to purchase some of its preferred stock. At that time Morris Brothers was a corporation with an authorized capital of $100,000 common stock only, and without power to sell or issue preferred stock. It was, however, represented to this claimant that the corporation had an authorized capital of $1,000,000, $500,000 of which was common stock and $500,000 preferred; that the common stock of the corporation was fully paid up with cash, bonds or other securities paid in or on hand to represent the same. Believing the representations so made, claimant agreed to purchase $2,000 of this preferred stock. He paid the corporation $2,000, being the proceeds of certain bonds owned [55] by him, then maturing, and thereupon an interim certificate was issued to him by which Morris Brothers agreed either to issue to him $2,000 preferred stock or repay to

him his money. The stock was not issued to him at that time. The interim certificate which he received is as follows:

"MORRIS BROTHERS, INC.
INTERIM CERTIFICATE. No. 838
Portland, Oregon, August 1, 1919.

"Upon the surrender of this certificate, properly endorsed, we will deliver to Mr. Albert C. Smith or order $2,000.00—Two thousand and no/100 Dollars—6% Morris Brothers, Inc., Preferred Stock Bonds due —— optional —— 19—, with —— and subsequent coupons attached, if when and as said bonds are issued and delivered to us.

"In the event said bonds shall not be issued and delivered to us, we will redeem this certificate for Two Thousand and no/100 Dollars—$2,000.00—and the interest which would have accrued on the bond since August 1st, 1919, but such interest will cease thirty days after we transmit notice to the above-named holder that the bonds will not be issued.

[Seal] "By JOHN L. ETHERIDGE,
"Treasurer."

Certain representations were made to Smith to induce him to enter the transaction. Smith testifies:

Testimony of Albert C. Smith.

"A. At the time the matter came up I was working for Archer & Wiggins at 6th and Oak Streets in Portland, Oregon, in the latter part of July, 1919. Mr. DeLong came down to see me one day in a friendly way and mentioned the fact that I had some bonds and they were due and if I wished I could turn them in to Morris Brothers and they would collect them."

Mr. DeLong was salesman for Morris Brothers. Following the conversation with him I studied the matter over and considered it from an investment standpoint, and then turned in my $2,000 of Canadian bonds for collection and agreed to take $2,000 of preferred stock. The understanding I had from Mr. DeLong was that their financial condition was in the very best shape. He told me it was a firm doing a wonderful business and that the company's stock was [56] all paid for and that the preferred stock would be a fine buy, better in my case than any other stock, although he said I would not have a vote. He said the preferred stock, in case of any trouble with the corporation, would be paid for first and would draw six per cent interest plus a division of the dividends after the common stock was paid off. In other words, the preferred stock would be paid at six per cent, and the common stock and the rest of the dividends divided between the common and the preferred at the same ratio.

(Testimony of Albert C. Smith.)

Q. How much common stock did he tell you was paid up? A. $500,000.

Witness continues: The preferred stock to the amount of $500,000 would be issued; that the financial condition of the corporation was better or as good as any large corporation, and it was doing a wonderful business and increasing daily. I believed and relied on these statements to a great extent, and based upon them I turned in my Canadian bonds for collection and received the preferred stock and a check for interest on the Canadian bonds. I did not get the preferred stock immediately, but did get the interim certificate which I held from July 31, 1919, to January 13, 1920.

Smith produced a letter dated Portland, Oregon, January 13, 1920, addressed to himself, signed by Morris Brothers, reading:

"We are pleased to enclose you herewith by registered mail, certificate Number 39 for 20 shares of Morris Brothers, Inc., 6% Preferred Stock. Kindly sign and return the attached receipt.

"It is agreed that the Preferred Stockholders of Morris Brothers, Inc., in case of the desire to sell this stock, shall first offer the same to John L. Etheridge, President of Morris Brothers, Inc., at $102.50 per share and accrued dividend, in view of which that, the company hereby agrees that the preferred stockholders shall participate in dividends in like amount to the common stockholders should the directors of the company declare divi-

(Testimony of Albert C. Smith.)

dends to the common stockholders in amounts exceeding six per cent.

"Knowing the favorable consideration shown Morris Brothers, Inc., by you, the directors felt that it would be binding our friendship by having you financially interested with us, and for this reason you were carefully selected by the Directors.

"With kindest personal regards from the writer and hoping you will come into the office whenever you are in the city, we are,

"Yours very truly,

"MORRIS BROTHERS, INC.

"By J. L. ETHERIDGE,

"President.

"JLE.A.

"P. S.—We will be pleased to have returned to us the interim certificate you now hold covering this stock and greatly oblige. J. L. E." [57]

And a second letter of the same date as follows:

"We take pleasure in enclosing you herewith our check for $66.67 being equivalent to a semi-annual dividend on your twenty shares of Morris Brothers, Inc., 6% Preferred Stock from July 31st, 1919, to January 1st, 1920, plus an additional 1% which is the equivalent to an additional 1% dividend, making a total of 4% from the date you purchased your stock to January 1st, 1920.

(Testimony of Albert C. Smith.)

"Thanking you for your many courtesies, we are,

"Yours very truly,
"MORRIS BROTHERS, INC.
"By ————————————,
"President.

"JLE/A."

Witness continues: Upon receipt of these letters I mailed my interim certificate to Morris Brothers, and thereafter received one dividend. At the time of taking the dividends I did not know anything about the financial condition of the company that would lead me to believe it was probably insolvent. The first I really learned that Morris Brothers, Inc., was involved financially was when it came out in the "Oregonian" December 31, 1920. I was not connected with the management of Morris Brothers in any way, held no position in the concern, and no statement of any kind was ever made to me of its true condition.

Witness then produced stock certificate 29 for thirty shares of stock, being attached to the claim of Albert C. Smith, stamped received January 24, 1921, identified it as his certificate which he turns back for cancellation, as hereinafter shown, which is as follows:

No. 39. Shares 20.

Incorporated Under the Laws of the State of Oregon.

MORRIS BROTHERS, INC.

Capital Stock $1,000,000.00, divided into Preferred Stock $500,000.00, Common Stock $500,000.00. Total number of shares 10,000, par value $100.00 each.

THIS CERTIFIES THAT ALBERT C. SMITH is the owner of twenty shares of the Preferred Stock of Morris Brothers, Inc., transferable only on the books of the corporation by the owner thereof in person or by attorney upon the surrender of this Certificate duly endorsed. This Certificate entitled the owner to receive and the Corporation is bound to pay out of any and all surplus and profits whenever ascertained, cumulative dividends thereon at the rate of six per cent per annum, payable semi-annually before any dividend shall be declared on the Common Stock. [58]

The preferred stock is subject to redemption at the rate of One hundred two dollars and fifty cents ($102.50) per share on any dividend paying date that the Board of Directors may select.

It is expressly stipulated and agreed by and between the holders of preferred stock and Morris Brothers, Inc., that the holders of preferred stock shall have no vote in the corporation.

IN WITNESS WHEREOF the said Morris Brothers, Inc., has caused this certificate to be

signed by its president and its secretary under the corporate seal this 13th day of January, 1920.

MORRIS BROTHERS, INC.
By JOHN L. ETHERIDGE,
President.
FORBES B. PRATT,
Secretary...

Shares $100 each.
Corporate Seal.

Testimony of——De Long.

Witness DE LONG, a witness for claimant, to whom Smith refers, testified that for some considerable time prior to 1919 he was a salesman for Morris Brothers. He then occupied the premises on Stark Street between Fifth and Sixth; that he solicited customers for preferred stock of Morris Brothers, and made representations upon information from Mr. Etheridge himself; that he remembered making sales of preferred stock to claimant Smith; he had known Smith two or three years prior to this sale.

Witness continues:

"A. As I recollect now I approached Mr. Smith and told him that the institution was issuing some preferred stock, and they were revising and enlarging their business and needed some outside capital. I don't know, but I may have given him a historical sketch of the institution as to how it was founded, its growth and development, and a statement of the sales as they were at the time I became associated with the institution, which was about the same time Mr. Etheridge became associ-

(Testimony of —— De Long.)

ated with it over in the Railway Exchange Building: the amount of the sales at that time and how they had grown ('Grown' did not refer to sales of preferred stock but to sales in general) . . . Then I gave him a statement or told him rather what this preferred stock was to be. It was to be part of a million dollar corporation and half was to be preferred stock and half common stock, as I recollect it. The preferred stock was to be $100 and the common $250. . . . One hundred thousand preferred and two hundred and fifty common was the original plan, but later on I was told it was to be half a million dollars, and then just shortly before I closed my selling of the preferred stock there was information that it was to be a million dollar corporation. I told this to Mr. Smith, I think." [59]

Witness continues: It was in 1919 that I closed the deal with Smith. I was closing the campaign, —but really no campaign was carried on, it was just selling intermittently from the time it was first started, towards the last that was sold. I had told him that the company had always paid a fair dividend but that the preferred stock they were selling then would likely be better than six per cent, undoubtedly would be around seven to eight per cent and possibly more. That it would be a six per cent certificate, that that is what they would guarantee on the face of the certificate. I am not clear as to what I told him in reference to the amount of common stock paid up. At first it was

(Testimony of —— De Long.)

to be a $350,000 corporation divided into $100,000 preferred and $250,000 common. I may not be correct as to this amount, but it was gradually increased later on to half a million dollars, I was told, and still later, to the million dollar corporation. That was in the summer of 1919. I had no knowledge of a million dollar corporation until late in the summer.

Q. What, if anything, did you say to Mr. Smith in reference to the form in which this common stock that was paid up existed?

A. I do not know that I can recall what I told him about that. I presume I told him it was paid up but I cannot tell you definitely as I do not recollect.

Q. Do you remember whether anything was said by you at that time as to the amount of property that Morris Brothers, Inc., had?

A. I undoubtedly told him as I told other people, that whatever money they had was invested in bonds that they had been buying for a number of years, municipal and other satisfactory bonds, which they had been buying for a number of years, and what money they had invested in their plant, the fixtures and so forth, and the lease I presume I mentioned that too. I no doubt told him that they did not own the building, but that they had a ninety-nine year lease on it at a rental of about $500 a month which was tantamount to owning the building, although they did not own the prop-

(Testimony of —— De Long.)

erty outright. Otherwise there was nothing that their capital stock was invested in.

Stating the representations which the witness made about the preferred stock, witness says: [60]

A. Yes, the preferred stock was not to have any voting power until after they had passed one or two dividends, I believe it was two, at which time they would be allowed to participate and note the same as the common stock, there was some advantage there, the advantage was over the common stock. I do not remember exactly the preferred stock was preferred as to assets and as to dividends over the common stock, that first out of the earnings there would be paid the expenses and then six per cent would be set aside for the dividends on the preferred stock and after that six per cent was to be paid to the common stockholders. After these two amounts had been taken out and set aside whatever was left, if there was anything left, it would be prorated share and share alike among all the stock, common and preferred. The certificates did not cover that.

Witness testifying about his statements to Mr. Smith and to other preferred stockholders, in reference to the financial condition of Morris Brothers as to whether it was *dound* or not, says:

A. About as near as I can answer that question is to say, that I said the assets of the institution consisted of municipal and Government bonds, that their funds were invested in that other than what was invested in their plant and equipment. I told

(Testimony of —— De Long.)

them where the fixtures came from, the old United States Bank Building, and that had a lot of money invested in the fixtures and safe deposit vaults, and other than that they had no money invested in property to my knowledge; that they did not own the building but had a ninety-nine year lease on it and I was informed that the rental was $500 a month. I will say this that what I told Mr. Smith was undoubtedly about the same as I told other people with whom I had up the matter of buying preferred stock. All I was aiming at was this, that was what was in my mind all the time and I know that must have been the impression I left with Mr. Smith regardless of what particular words I used, that the institution was a fine institution to be connected with or associated with. I know I must have left that impression with him, whatever I said, but as to the statement that the institution was solvent or a sound institution, as to the words themselves, I am sure that I did not use those words, for this reason, that I do not think that as a salesman when I came to selling stock to anyone that I would use those words. I would not want to bring up the question as to its solvency. I know that was not in my mind, but I know that I did try to leave in the minds of the people with whom I was doing business that I was connected with a fine institution.

Witness continues: I say the information came from Mr. John L. Etheridge, President of Morris Brothers. He was manager of the company at

(Testimony of —— De Long.)
that time. He was the only one I recognized as having any authority. I had no means of information myself as to the [61] institution, concerning its assets, financial condition, organization, stock, etc., outside of what Mr. Etheridge told me. I had no access to the books and records at all, and no one else seemed to know anything about it.

On cross-examination the witness says: I believed everything I said to be true. I might have talked with Mr. Smith more than once about his buying the preferred stock. At first I understood the corporation would have $250,000 worth of common stock and $100,000 of preferred, but later it was to be half a million, I think. I got the information that the corporation would have half a million worth of stock, I should judge, early in 1919, and I got the impression that it would be a million dollar corporation after the middle of the year. I cannot say that was before or after I got Mr. Smith's subscription; it was along about that time that I was informed it was going to be a million dollar corporation and the stock would be divided fifty-fifty. I told Smith the common stock was paid. My information was that it was paid. I came with the company the fore part of the year 1917, about the same time Mr. Etheridge did, and first sold preferred stock in this company in the latter part of 1918.

Witness further testifies:

(Testimony of —— De Long.)

Q. Now, just repeat the conversation you had with Mr. Smith.

A. Well, as I said I cannot repeat the words that I used.

Q. Repeat the substance of it then.

A. I approached him and told him that the company was reorganizing, that they were expanding and increasing their business inasmuch as they expected to have additional capital.

Q. In regard to that you had personal knowledge of the company and knew that they were increasing their business and their stock?

A. Yes.

Q. You knew that personally? A. Yes.

Q. You knew that to be a fact? A. Yes.

Q. What else did you tell him?

A. I told him—I went into details with this preferred stock, told him there would be so much issued, and so on. [62]

Q. Did you tell him how much would be issued?

A. I must have told him how much would be issued.

Q. What did you tell him in regard to that?

A. As to how much would be issued?

Q. Yes.

A. It was about the time I learned of the million dollar corporation and I think that I told him about that.

Q. Did you tell him how much preferred stock was sold?

A. Well I don't know whether I did or not.

(Testimony of —— De Long.)

Q. How much was sold; did you know how much had been sold at that time?

A. At that time there had been something over 80,000 dollars worth sold, maybe more.

Q. Did you tell Mr. Smith that you had sold $80,000?

A. Now, I must have told him. I would think that I did tell him.

Q. You now remember that you expected to sell about $420,000 more? A. No, I did not.

Q. You told them they expected to sell about half a million dollars worth of preferred stock?

A. That was the issue.

Q. You say you had sold about $80,000 at that time, at the time he subscribed? A. Yes.

Q. What did you tell him about that?

A. Well I told him the amout of business the institution had done and how it had increased since I became associated with it in 1917.

Q. What did you tell him about that?

A. Told him they were doing about $200,000 a month approximately at that time and at this time I was talking to him their sales had increased up to a million, or between one and two millions, I have forgotten the figures.

Q. Where did you get the information about the $200,000 a month when you came there?

A. That is what I was told.

Q. You had no personal knowledge of that fact?

A. No, I had not.

(Testimony of —— De Long.)

Q. Didn't know whether that was true or not?

A. All I knew about it was that I was given a statement to that effect.

Q. Who gave you that statement?

A. Mr. Etheridge.

Q. You told him at the time you took his subscription you were doing how much business?

A. I do not recollect, a million or a million and a half a month. Whatever the statement showed.

Q. You do not recollect?

A. It was over a million and less than two million that they were doing at that time.

Q. What else?

A. I told him this stock was to be preferred as to the assets and liabilities over the common stock, that first there was to be set aside after the expenses were paid six per cent dividend for the preferred stock and after that the common and then what was left was to be divided between the preferred and common share and share alike; that after the second dividend was not paid on the preferred the preferred stockholders were to be given a vote with the common. The preferred could not be called [63] before five years so that he knew he would have his money out at 5% at least for five years. I told him that the institution had always paid fair dividends and that in all probability it would pay considerably more than six per cent, but that six per cent would be guaranteed. I told him after

(Testimony of —— De Long.)

five years they would have the privilege of calling the stock in at $105. I told him that if he was in a position to make this investment that the government income tax would be refunded to him by the company so that it would be the same as exempt from income tax. I offered to take in some bonds he had, I have forgotten what they were, as payment for the stock just as cash.

Q. Did you tell him anything else?

A. Well, I don't know just what else I did tell him. As I have said before I left the impression with him that the institution was a good institution, that the money of the company was invested in good securities, municipal bonds and so on, securities which were undoubtedly safe, and their fixtures and lease. I know that I tried to leave the impression with him that it was in first class condition as to being a good institution in which to make the investment.

Testimony of Albert C. Smith.

Claimant SMITH states that at the time Mr. De Long talked with him about the purchase of stock De Long told him that the assets of the firm were composed of bonds and fixtures and the lease on the building, which he said were the same as cash, that is that it was good security; he said the value of the assets was supposed to be about $500,000 all in stock.

Witness continues:

In September, 1919, a new corporation was form-

(Testimony of Albert C. Smith.)

ed under the laws of Oregon with its principal place of business at Portland, Oregon; with the identical name of the original corporation, the new corporation having an authorized capital of $1,000,000, of which $500,000 was common stock, and $500,000 was preferred stock. All, or substantially all, of this stock was subscribed by one of the stockholders of the old corporation. That institution went through the form of transferring to the new corporation all of its assets in payment of the stock so subscribed and thereupon the stock of the new corporation, both preferred and common, was issued to Stella M. Etheridge, who had subscribed for the same, she being the wife of John L. Etheridge, president [64] and manager of said old corporation. There was issued to John L. Etheridge and one Pratt sufficient of this stock to qualify them as stockholders and officers of the new corporation.

On July 31, 1919, Smith accepted an interim certificate, whereby Morris Brothers agreed to deliver to him $2000 of preferred stock of the company. This was carried until January 13, 1920, when Morris Brothers delivered to Smith and Smith accepted in lieu of the interim certificate a certificate purporting to represent twenty shares of preferred stock. At the time this stock was delivered Morris Brothers paid Smith $66.67, being the interest on the stock to January 1, 1920, plus 1 per cent, and, by admission in the petition, petitioner received an additional sum which, to-

(Testimony of Albert C. Smith.)

gether with the $66.67, aggregated $146.67, covering interest on the stock at 8 per cent from July 31, 1919, to the 1st day of July, 1920. Smith was the holder of the stock when Morris Brothers failed, which was about the end of 1920.

On September 6, 1919, at a special meeting of the stockholders and by a resolution thereby adopted, the corporation was declared to be dissolved and the directors were authorized and empowered to sell its business to a new corporation, bearing the same name, for the sum of one million dollars. Steps were thereupon taken for the organization of the new corporation. Articles of incorporation were executed and filed fixing the amount of capital stock at $1,000,000, consisting of 5000 shares of common and 5000 shares of preferred; the latter to be without voice in the management of the concern. Stock books were opened and subscriptions were made as follows:

S. M. Etheridge, common stock, 4998 shares; preferred, 5000 shares, amount $999,800. Forbes B. Pratt, common stock, 1 share, amount $100; and John L. Etheridge, common stock, 1 share, amount $100. [65]

Directors were elected and by-laws adopted. Among other things sought to be accomplished was a transfer of the assets of the old corporation to the new at a valuation of $1,000,000; the new corporation assuming and obligating itself to pay the debts and obligations of the old. The books of the

(Testimony of Albert C. Smith.)

new company do not appear to have been written up until January 1, 1920.

By a report of Morris Brothers, Inc., made to the Corporation Commissioner at Salem, Oregon, June 30, 1920, the capital stock thereof is represented to be $1,000,000, divided into 10,000 shares at $100 per share, all issued as paid up.

The original stock subscription of Stella M. Etheridge and John L. Etheridge and Forbes B. Pratt to the new Morris Brothers, Inc., were never paid in any other way than by the transfer of the assets from the old Morris Brothers, Inc., to the new company.

The business of the new company was carried in the books of the old company up to about January 1, 1920. There is an account on the books showing all sales of preferred stock, heading of the account being "Morris Brothers Preferred Sixes." Mrs. Etheridge is credited with $102,200 proceeds realized from the sale of preferred stock, and on the other hand is charged with an equal amount of bonds taken by her to satisfy this credit. Smith claims a lien upon these bonds.

After the failure of the concern, $75,000 of these bonds were found in Tacoma, Washington, but were returned to the trustee, and $25,000 found in the possession of the company itself, were turned over to the trustee. At the time of the failure there were outstanding $64,500 in amount of the preferred stock among different persons who had

(Testimony of Albert C. Smith.)

purchased from the company. This includes Smith's stock. [66]

On February 21, 1919, Morris Brothers, Inc., acting through John L. Etheridge, President, drew a check on the United States National Bank for $100,000. Thereupon the Bank issued its cashier's check for a like amount, and this was in turn deposited with the Forest Grove National Bank to the account of Stella M. Etheridge, and was checked out soon thereafter, $99,600 to Henrietta A. Morris and $400 to Fred S. Morris. There was also diverted to the personal account of Fred S. Morris a large amount of securities.

When Morris Brothers closed its doors, the claims of the general unsecured creditors aggregated in excess of $1,824,000, the greater portion of which claims was, says the accountant, "contracted naturally in the last three or four months of business, from the first of September, 1920, on."

Testimony of Accountant Bosworth.

Accountant BOSWORTH, a witness for claimant, on cross-examination, says:

Q. Have you personally checked or examined all of the books and the different entries pertaining to the preferred stock that was issued by Morris Brothers? A. I have.

Q. Will you state to the Court the amount of preferred stock now outstanding?

A. My recollection is outside of the amount to

(Testimony of —— Bosworth.)

be owned by Stella M. Etheridge, $64,500 par value.

Q. Can you refer to your books and give the Court when that stock was paid for?

A. The sale of preferred stock is evidenced by interim started November 1, 1918.

Q. When was Mr. Smith's preferred stock paid for?

A. He bought an interim for preferred stock July 31, 1919.

Q. Can you tell what he paid for it? A. $2,000.

Q. To whom was this paid? [67]

A. The entry shows it was taken into the account of Morris Brothers.

Q. Do you know whether this money was used by Morris Brothers in the general course of business? A. It undoubtedly was.

Q. From the examination of the books you have made?

Mr. SMITH.—We object to the question in the form in which it is put. We would have no objection to the witness attempting to show how the cash account treated it.

Mr. WINTER.—This is an expert witness.

Objection overruled.

A. The amount received from Mr. Smith went into the general funds of the corporation, and used by them in their general operations.

Q. What do you mean by general operations?

(Testimony of —— Bosworth.)

A. I mean not segregated into a fund by itself but went into the common fund and was probably deposited in the United States National Bank and used by them for buying bonds, stocks, paying wages, rent, etc. In other words, it did not go into a trust fund, if that is what you are trying to get at.

Q. Will you turn to the entry of Mrs. Etheridge where she was given credit for $102,200 in the ledger; what is the date of that entry?

A. The heading of the account shows "1920" and the column that carries the day of the month shows "12." There is no entry showing the month. Other evidence though, from the journal, will show it was January 12th.

Q. January 12, 1920? A. Yes.

Q. You may state whether this entry is true or fictitious?

A. It is apparently a fictitious entry.

Q. In what respect?

Mr. REYNOLDS.—We object to that.

Mr. WINTER.—We have a right to ask him about his report. [68]

Mr. REYNOLDS.—We object to the question and the answer and move it be stricken out for the reason it does not appear in what way the answer can apply, whether the fact is not true or whether the entry is a forgery.

Mr. WINTER.—Fictitious, not a forgery.

The REFEREE.—If it is fictitious it is not a true entry, and you will have to inquire into that.

(Testimony of —— Bosworth.)

Q. Why do you state it is fictitious instead of being a true entry?

A. My reason may be for several reasons. In the first place my examination of the books does not show that anything was ever paid for the preferred stock by her. I find no record of any payment by her.

Q. Have you examined the records of Morris Brothers carefully to find out whether Mrs. Etheridge ever paid anything for this preferred stock?

A. I did in all places.

Q. And you discovered no such entry?

A. I discovered no such entry.

Q. At the time this preferred stock was issued to Stella M. Etheridge you may state whether or not Morris Brothers at that time was solvent or insolvent?

A. That is you want my expert opinion?

Q. Yes.

A. They were insolvent.

Q. They were insolvent at the time? A. Yes.

Q. You may state if you can from your examination of the books whether or not you were able to ascertain whether Morris Brothers were insolvent on July 31st when Mr. Smith bought his preferred stock?

A. I would say they were insolvent at that time.

Q. You think they were?

A. I think they were.

Q. Did the corporation ever receive payment for

(Testimony of —— Bosworth.)

the preferred stock issued to Mr. Smith except what was received from Mr. Smith? [69]

A. Not that I ever found.

Q. If it had received payment would not you have discovered that fact in your examination of the books? A. I would.

Q. What compensation, if any, did Morris Brothers receive for the check for $100,000 which was drawn on the U. S. National Bank and which was afterwards sent down to the bank at Forest Grove? A. Nothing.

Q. From where was this $100,000 taken?

A. From the United States National Bank.

Q. Was that a deposit?

A. That was a portion of their deposit with the United States National Bank and withdrawn from that deposit.

Q. What compensation, if any, did Morris Brothers ever receive for any bonds that they apparently sold to Mrs. Etheridge? A. None.

Q. No consideration was ever paid by Mrs. Etheridge for these bonds?

A. No true consideration. No consideration in the form of a valid payment. Nothing but a book entry.

Q. Then as to the books of Morris Brothers showing that Mrs. Etheridge purchased $100,000 worth of bonds, that is not true?

A. The books show that they were paid for but the entry is fictitious.

(Testimony of —— Bosworth.)

Q. The fact is they were not paid for?

A. Yes, not by her.

Q. Were they paid for by anybody except by Morris Brothers when they bought them?

A. That is all.

Q. These bonds according to the books that were sold to Mrs. Etheridge were the property of Morris Brothers? A. Yes.

Q. And had been all paid for by Morris Brothers in the ordinary course of business?

A. Yes, that is right.

Q. And afterwards when they were turned over to Mrs. Etheridge Morris Brothers received nothing for them? A. That is right. [70]

Q. What compensation, if any, did Morris Brothers ever receive for the check of $24,800—to whom was that check made?

A. To Henrietta A. Morris.

Q. What did Morris Brothers receive for that check? A. Nothing.

Q. The books as I recall show and as you have testified show that this $100,000 sent down to the bank at Forest Grove—

A. Yes, it was sent down to the bank at Forest Grove.

Q. What became of that?

A. The charge to the Forest Grove National Bank continued on the books until December 31, 1919, and on the opening of the new ledger in 1920 it disappeared.

(Testimony of —— Bosworth.)

Q. What became of the money?

A. That was sent down to the Forest Grove National Bank—do you want me to testify to my personal knowledge?

Q. Yes.

A. I went to the Forest Grove National Bank and found a cashier's check issued to the Forest Grove National Bank had been deposited with that bank the check being accompanied by a letter signed by Morris Brothers by John L. Etheridge directing that this $100,000 be placed to the credit of Stella M. Etheridge and that she was drawing it out at once, and that they took this course because they did not want the local banks to know their action.

Q. It was actually deposited and afterwards withdrawn?

A. It was actually deposited to the credit of Stella M. Etheridge and thereafter withdrawn.

Q. How was it withdrawn?

A. Two checks, one for $99,600 and the other check for $400.

Q. And the check for $99,600 was in favor of Henrietta A. Morris as you have already stated?

A. Yes.

Q. What compensation, if any, did Morris Brothers ever receive for the check of $99,600 that was delivered to Henrietta A. Morris? [71]

A. What compensation?

Q. What did Morris Brothers receive for this check that was turned over to Henrietta A. Morris?

(Testimony of —— Bosworth.)

A. This money was deposited in the Forest Grove National Bank and was no longer in the control of Morris Brothers.

Q. Did Morris Brothers ever receive anything for it? A. No.

Q. What became of this check?

A. It was redeposited with Morris Brothers, Inc., by which she received credit for $99,600.

Q. Who? A. Henrietta A. Morris.

Q. Does that still exist?

A. That particular account is now balanced.

Q. What did Henrietta A. Morris receive for the check of $99,600 that she deposited with Morris Brothers?

A. She received Liberty Bonds to the amount of $74,985.46 and a check of Morris Brothers in her favor for the difference between that amount and the $99,600.

Q. They got their own money back?

A. In that way.

Q. They got their own money back before, so that the result is that ultimately Morris Brothers turned over to Henrietta A. Morris Liberty Bonds and a check totalling $99,600 and obtained nothing for it whatsoever.

There is no controversy over the fact, but it is admitted, that during all of this time both the old corporation and the new corporation were insolvent and the new corporation was in a continuous state of insolvency from the time of its organization to the date of its adjudication in bankruptcy; also

(Testimony of —— Bosworth.)

that subsequent both to the time Smith made his purchase and to the time the stock was issued to him the new corporation accumulated obligations in a large amount, totalling at the date of adjudication more than $1,500,000, claims for which, general and preferred, have been filed in this court. The assets are not sufficient to pay said claims in full. [72]

The stock issued to Smith, together with dividends thereon, was accepted and retained by him at the date of adjudication, but it is undisputed that he knew nothing of these practices of the corporation until they were discovered after the failure. Other preferred stockholders to the amount of about $64,500 are similarly situated and are asserting their claims against the trustee.

There is no evidence to show that any creditor of the corporation knew of the transactions by which Smith received the preferred stock, or of his holding preferred stock, until after the bankruptcy.

The company's report to the state gave capital stock as $500,000 common and $500,000 preferred, all fully paid; and its stationery and advertising showed capital $1,000,000.

The stockholders of the new corporation at its organization were the same persons as the stockholders of the old at its dissolution.

The other purchasers of preferred stock gave testimony showing representations made to them of like import as those made to induce Smith to purchase. The statements made to them were

(Testimony of Albert C. Smith.)

made by John L. Etheridge, President of the corporation, direct.

OFFER OF CANCELLATION.

The record contains the following testimony and proceedings and none other on the offer of claimant to surrender his purported certificate of preferred stock for cancellation and for such relief as is proper.

Testimony of Albert C. Smith.

Witness and claimant ALBERT C. SMITH, on direct examination, says:

I tender my alleged preferred stock for cancellation in this proceeding to have the money paid, and am ready to return the money paid me or have it paid. [73]

Q. The certificate of stock which I now hand you and which is attached to your original claim as presented was the stock you received from this concern? A. Yes.

Q. Certificate No. 39 for twenty shares of stock, and this is the certificate we offer back for cancellation, the certificate attached to the claim of Albert C. Smith, stamped received January 24, 1921, but not signed, and it is also stamped "Ans'd." Let the record show that that was produced from the custody of the referee. Is that true, Mr. Smith?

Mr. WINTER.—I don't know about that. I don't understand that.

Mr. SMITH.—This is produced from the custody of the Referee.

(Testimony of Albert C. Smith.)

Mr. WINTER.—All right.

Q. Now, answer my question.

A. What is the question?

Q. Is that the certificate you tender back for cancellation? A. Yes

Mr. SMITH.—I offer this certificate in evidence and ask that it be marked.

Said certificate was thereupon marked Claimant's Exhibit 3.

"Mr. WINTER.—It is admitted that if Albert C. Smith was on the witness-stand he would testify that he was and is able to repay to the trustee anything that he has received on his preferred stock by way of dividends."

Judge WOLVERTON held on appeal: "The regular procedure, however, by which to recover in such a case, as for money had and received, is by repudiation of the stock purchase, accompanied by notice of rescission and an offer to return whatever of value has been received by the purchaser, in order to place the corporation *in statu quo.* 14 C. J. 592. That has not been done in the case at bar. The petitioner has simply [74] presented his claim against the estate, accompanied with a declaration of willingness on his part to do and perform whatever the court shall deem equitable in the matter of restoration of dividends paid on the stock and received by him. However, as it is not apparent that petitioner had knowledge of the alleged fraud or the insolvent condition of the corporation prior to its collapse, and as there has

(Testimony of —— Bosworth.)

been interposed no technical insistence upon a strict compliance with the practice, the matter will be laid aside and the cause determined upon its merits.

APPELLANT ASSERTS A PRIOR CLAIM ON CERTAIN BONDS.

Testimony of —— Bosworth.

Witness BOSWORTH, for claimant, on direct examination says:

I have accessible here the account in the trade account ledger in the name of Morris Brothers preferred sixes. This account represents moneys received from the sale on interims of Morris Brothers preferred six per cent stock. It shows that through preferred stock sales these various amounts as listed in the ledger have been received and shows their credit to Morris Brothers preferred stock. This large ledger I can say consists of accounts of various issues of bonds and stocks, and if Morris Brothers bought an issue of bonds, on one side of the account was set up the value of the bonds that they purchased, and on the other side, the right hand side, was set up the sales as they were made from time to time. In this case, the right hand shows the sales of Morris Brothers preferred stock and the dates of the sales and was carried in their trade account as they carried the account of other securities in which they dealt. This account shows sales from November 1, 1919,

(Testimony of —— Bosworth.)

to apparently the last sale October 16, 1919, and at November 1, 1919, they were apparently oversold two thousand at that time. I might explain that. I will have to change my desk—(*sic,* testimony)—a little on that. I beg your pardon, the last sale of preferred stock to the public—I suppose that is the date Mr. Reynolds wants—[75] was apparently January 12th or possibly January 23d. I could not tell without referring to their records of 1920.

With reference to that there is a sale here for $600 and a debit on the date following, January 13th. Later than January 12th, the items that appear, there is another for $50 on January 23d on the credit side, and $100 on the debit side of the same date.

On November 1, 1919, the amount sold and outstanding appears to be $112,500.

"Mr. WINTER.—What is that—money?

A. Money. On November 3 an offsetting item of $10,000 brought it down to $102,250 at the end of November."

Witness continues: Eliminating these items of $50 and $600 on the credit side and of $100 on the debit side, the net proceeds which were credited to this preferred stock account at that time is $102,200. Referring to the debit side of the account, the other items appear on January 12th and there is a debit item of $102,200.

Q. What entry does that represent and what

(Testimony of —— Bosworth.)

transaction is shown by the further books of the company?

A. By reference to the journals of the corporation on page 103, cash book and journal of Morris Brothers, Inc., on January 12, there appears an entry crediting the account of Stella M. Etheridge with $102,200 and debiting drawing account with $102,200, with the notation purchase bill 11251 to 11295 inclusive Morris Brothers, Inc., preferred stock.

Witness continues: Q. What then, Mr. Bosworth, does this apparently represent from a bookkeeper's interpretation?

Mr. WINTER.—If the witness can answer that.

A. Apparently it represents a transfer of a credit from one account [76] to another.

Q. And the credit referred to is the credit in the trade account ledger of Morris Brothers sixes of the $102,200 then appearing to be standing to the credit of that account by sales of preferred stock, does it not?

A. I have answered that question in my answer to the last question I think. It is the transfer of an account then and there appearing in the trade account of Morris Brothers sixes to the account of Stella M. Etheridge.

Witness continues: In that journal entry in which this transfer is made and representing this transfer is a reference to purchases from Stella M. Etheridge of preferred stock.

(Testimony of —— Bosworth.)

"Q. Referring to the date of issuance of the original certificate for preferred stock to Stella M. Etheridge, that date was January 12, was it not?

A. Preferred stock, December 1, 1919.

Q. Then on what date was the certificate cancelled?

A. There is no mark to indicate on what date it was cancelled."

Witness continues: The stock certificate book shows the turning back by Stella M. Etheridge of preferred stock in blank January 10, 1920; that is, certificate No. 1 on the January 10, 1920; there appears on the stub of certificate No. 2, issuance to Elias A. Johnson of 100 shares, but there is no memorandum showing from whom the transfer, from what stock it was transferred—that is the same date as the other certificate.

Witness continues: Explaining the reissuance of these certificates—on certificate No. 1 preferred stock, the total documentary stamps attached amount to $250, on the certificate $100. These were cancelled on the stub by C. P. Deputy Coll. On the documentary stamps on the certificate the date is merely used as a cancelling mark and no initials or other particulars are given. This certificate No. 1 was never detached and the signature on the books [77] reads "Stella M. Etheridge," as also does receipt for the stub. There is a receipt upon the stub for certificate No. 1 preferred stock by Stella M. Etheridge. There it is.

(Testimony of —— Bosworth.)

"Q. As I understand you the first certificate of preferred stock which was issued outside of this issue of the entire amount of the certificate representing the entire amount in favor of Stella M. Etheridge was on January 10th?

Mr. WINTER.—I object to the question as leading.

A. I don't know that I understand the question exactly. This record does not show that that stock certificate was ever issued or ever detached, it does not show any revenue stamps were ever attached to it.

Q. That is certificate No. 2. When is the next transaction after the certificate No. 1 of preferred stock to Stella M. Etheridge as far as the certificate shows the date; what was the next entry in the certificate book?

A. Where there is apparently a complete transaction. Certificate No. 2 is apparently incomplete as far as the delivery was concerned.

Q. Never was endorsed, was it?

A. Never was endorsed.

Q. What is the next?

A. Certificate No. 3, five shares of preferred stock was issued to Florence J. Sims, Eugene, Oregon, January 10, 1920, receipted by her on the 17th of January, 1920.

Q. Still outstanding?

A. The certificate not attached. No documentary stamps attached to the stub.

(Testimony of —— Bosworth.)

Q. And from dates, from what period are the dates of apparent reissuance of this certificate?

A. They start with January 10th and the last issue of the preferred stock of Morris Brothers is of certificate No. 50 for five shares of preferred stock of Morris Brothers to Stella M. Etheridge dated November 19, 1920, and receipted for by her on blank date. [78]

Q. What record is there on the stub of that certificate as to the source of that stock?

A. States it was transferred from Alex W. Sims, Certificate No. 12 for five shares, five shares transferred. Certificate to A. W. Sims dated October 16, 1920, as the record shows it."

Witness continues: Mrs. Etheridge had two accounts covering the period from January 12, 1920, to November, 1920,—one in the general ledger and a drawing account, and I think she also had a trade account in the accounts receivable ledger. I have that.

Referring to the trade accounts ledger the account headed Mrs. John L. Etheridge, Portland, Oregon, with the side note "Stella M." shows certain transactions in the way of bonds and shares of preferred stock and other such matters.

Referring to the Stella M. Etheridge personal account in the general ledger, the account of Mrs. Stella M. Etheridge in the general ledger of Morris Brothers, Inc., there appears on the credit side of her account under date 1920, no month, 12th day, journal, page 103, credit of $102,200, and the ref-

(Testimony of —— Bosworth.)

erence to the same book and page at which I find the entry corresponding to $102,200.

On February 16, 1920, in the same ledger the following item appears, only one item, "1920 February 16, Journal 231, debit $102,751.18," and that is the only item on that date.

Witness continues: Referring to the book of original entries from which that item appears to be taken—the journal—in her trade account in the ledger, number one, Mrs. John L. Etheridge appears credited with the same item which I have just read, February 16, cash and journal book 231, $102,751.18. I have gone over the sales slips of the sales of bonds to Mrs. Etheridge which are the source of these entries, and these sales slips correspond with the entries in this ledger account. I have only two of the [79] sales slips. The rest are locked in the vault, but they are available if you want them. Referring to folio 15588, shown by this sales slip, it shows a sale to Stella M. Etheridge.

"Q. Now, Mr. Bosworth, you may continue and state what is shown.

A. This is a carbon copy of the original bill, sales bill of Morris Brothers indicating a sale to Stella M. Etheridge of $10,000 par value City of Victoria six per cent gold bonds at a price of 90.41. Do you want me to give a full description of these bonds?

Q. Did you state the maturity date?

A. Due March 1, 1928, together with accrued in-

(Testimony of —— Bosworth.)

terest thereon from September 1, 1919 to February 13, 1920 inclusive."

Witness continues: Another item covered by that sales slips is the sale of $15,000 par value City of Regina 6% gold bonds at 93.78 due March 1, 1923, together with accrued interest from September 13, 1919 to February 13, 1920, inclusive. Total of the sales slip items amounts to $23,787.17.

From examination of the books and accounts of Morris Brothers, it was customary in selling bonds and stocks to make out what they call sales slips. Sometimes they had what they called a pure memorandum which they used for reference purposes and that was also filed away. This is the first entry of record which is made of this transaction and the sales slips are consecutively numbered.

Referring to sales bill No. 15,589. This is apparently a carbon copy of sales bill selling to Mrs. Stella M. Etheridge $25,000 par value, carbon copy —(*sic.* Caribou County)—Idaho Road and Bridge 6% gold bonds at 107.25 together with interest accrued from January 21, 1920 to February 3, 1920 inclusive. The maturity of the $25,000 par value being as follows: $5000 due May 1, 1936, $10,000 due May 1, 1937, and $10,000 due May 1, 1938, aggregating [80] $26,991.67.

Referring to sales bill No. 15,590, carbon copy of sales bill purporting to sell to Mrs. Stella M. Etheridge $25,000 par value Teton County, Idaho, 5½% R. B. bonds at 102.20 together with accrued interest from January 1, 1920 to February 3, 1920 in-

(Testimony of —— Bosworth.)

clusive, maturity dates as follows: $5000 par value, due July 1, 1936, $10,000 due July 1, 1937, and $10,000 due July 1, 1938, total aggregating $25,-714.27.

Sales bill No. 15,591 carbon copy of sales bill—selling to Mrs. Stella M. Etheridge $25,000 par value Clarke County 5½% road bonds at 103, together with accrued interest from October 1, 1919 to February 13, 1920 inclusive; maturity date October 1, 1938, total $26,258.07.

Witness continues: I never looked for the sales slips themselves because when the bond was delivered it was filed in a date file and it would be purely a memorandum anyhow. I have never looked that up and don't know whether it is on record or not. It could be found, I suppose, possibly, according to my judgment this would be the original entry as far as the books are concerned, and the other was a preliminary memorandum only made up by the salesman or clerk notifying them he had made a sale to such and such a person for such and such a bond, and that was delivered to the bookkeeping department until the bond was delivered.

The aggregate of all these sales representing bill sales numbered from 15,588 to 15,591 is $102,751.18.

The credits which appear in the book which I am now consulting,—the first item is $102,751.18, on February 15 and 18 a credit of $2019.11. There are a number of credits if you want me to read them.

(Testimony of —— Bosworth.)

Q. What is that $2019.11?

A. There is a debit and credit for clearing the account, which is an [81] offsetting item. The same as $102,751.18, both of them offset each other.

Q. What does the account show as of August 21, 1920?

A. It shows they purchased from her certain bonds to the amount of $25,535.00.

Q. What please is the description of it?

A. It is not given here.

Q. Will you turn to sales bill 21,895.

A. I have the original, it purports to be the original of a sale to Mrs. John L. Etheridge of $25,000 par value Twin Falls County Buhl Highway district 6% bonds at par. Due January 1, 1936, together with accrued interest from July 1, 1920 to August 21, 1920, inclusive. Total sales $25,208.32.

Q. That entry corresponds in all respects with the sales slip—the entry in the ledger account corresponds with the slip you just read.

A. There is an entry in the ledger dated August 21, 1920, showing a debit to her account of $25,000 par value Twin Falls County, etc., 6%, total sales $25,208.32.

Q. What credit items appear as of August 21st?

A. $25,535, reference being made to purchase book page 154.

Q. Have you purchase book page 154?

A. That is the page in the purchase book itself.

Q. What would be the original entry correspond-

(Testimony of —— Bosworth.)

ing with the statement kept by the company of this item in the ledger?

A. The purchase bill, which are numbered consecutively, setting forth the names from whom purchased, the class of bonds, and a description of the securities purchased, the amount, price, etc. That is the original entry and then to the purchase book and from that the general ledger.

Q. Have you that bill so you can find it? [82]

A. I could find it in a very few minutes. I have the purchase bill here numbered 13,539.

Q. What is shown by that?

A. Carbon copy of purchase bill showing purchase from Mrs. John L. Etheridge of $25,000 par value Clarke County, Washington, 5½% road bonds at par, together with accrued interest from April 1st to August 21st, 1920. The total amount of the purchase bill being $25,535.

Q. What if anything does either of these bills show, or any of the records show as to this entry being an exchange?

A. The purchase bill I have before me has the word 'exchange' typed on the bottom of it. I do not recall whether the sales bill has or not. The sales bill 21,895—there is a notation on the bottom, credit by P. B. 13539 $25,535, balance due from Morris Brothers, Inc., $326.68, leaving a net balance of $25,208.32.

Q. Does that purport to be an exchange of the same Clarke County bond item represented in the sales bill 15591 for the Twin Falls bonds?

(Testimony of —— Bosworth.)

A. The numbers of the Clarke County bonds set forth in the sales bill 15,591 being the same numbers of the bonds purchased shown in purchase bill 13539 of Clarke County."

Witness continues:

"Q. In reference to these bonds appearing by the sales slips, referred to, to have been sold to Mrs. John L. Etheridge, I will ask you whether the books of the corporation show those bonds to have been paid for in other means than the use of the credit which was transferred to Mrs. Stella M. Etheridge's account from the Morris Brothers preferred six per cent, account in the trade account ledger?

Mr. WINTER.—You mean paid for by Stella M. Etheridge?

Q. Whether it appears that these bonds were paid for in any other way by her than the mere transfer of that account? [83]

A. The only entries debit and credit are those which I have recited in which it shows a transfer of a credit of $102,200 to her account which were offset by an equal amount charged of bonds. Does that answer your question?

Q. That answers the question. In reference to the account of the sales of preferred sixes to Morris Brothers in making up this credit to which you have testified before when you consulted the record, do you find that as a part of the credit for these sales of bonds there is included the sum representing the sale of preferred stock to Albert C.

(Testimony of —— Bosworth.)

Smith on the 31st day of July or the 1st day of August, or about that date in 1919?

A. I would probably or possibly might find it a little difficult to show you the account in the ledger, but I had prepared for Whitfield Whitcomb & Co. a statement of all interims issued for preferred stock which statement we were looking at yesterday, and I noticed listed a sale to Mr. Smith on the date he testified to. If desired I could run the sale down, as far as I am concerned and check my past search upon the same, but I will say that I believe that statement to be correct and it does represent a sale to him of that date.

Q. That we think is quite material for us to show unless counsel is willing to trust the witness' memory, although we would like to trace the matter down.

Mr. WINTER.—I don't know that I get your question. Your question is whether or not the credit given to Mrs. Etheridge of $102,200—whether or not that embraces the amount which Mr. Smith paid for his preferred stock?

Mr. REYNOLDS.—That is right.

Mr. WINTER.—I do not see how any bookkeeper or expert could answer that question.

The WITNESS.—I thought you asked me the question of [84] whether I was able to locate the credit that arose by reason of Mr. Smith's payment.

Q. And also to trace the credit of that amount

(Testimony of —— Bosworth.)

into this ledger account of Morris Brothers, Inc., preferred sixes.

A. The account shows and my recollection bears me out, I think, that he did purchase that number of shares on that date evidenced by interim certificate and that there was a contra-entry charging him back, but in the way of cancellation, for that amount up to the time the $102,200 entry was effective.

Q. Then based upon the original entry you referred to showing the sale to him on the interim of the $2,000 preferred stock there is a corresponding credit found in the ledger account?

A. Yes. Not in the ledger account, but in the trade account to Morris Brothers sixes. I can refer to it instantly. As I recall it the amount was $2,000 and that the sales number was 9050. Am I correct there?

Q. I am not certain of the number.

A. Just a minute (examining records). 9050 I find is a carbon copy sales-slip quoting a sale to Mr. Albert C. Smith, care Archer, Wiggins & Co., Portland, Oregon, $2,000 par value Morris Brothers, Inc. six per cent preferred stock at $2,000, and it is reflected in the corresponding entry in the trade ledger being the entry of July 31, apparently 1919, for $2,000 preferred stock par value $100, Morris Brothers, Inc. preferred sixes.

Witness continues: On answering your question as to what would be the largest total amount of

(Testimony of —— Bosworth.)

preferred stock outside of Mrs. Stella M. Etheridge personally at any time—

"A. That would be a pretty difficult thing to say offhand, except this, at that particular time the largest amount was the amount that was outstanding immediately following the issuance of the [85] preferred stock to those holding interims for preferred stock. Immediately thereafter Mr. and Mrs. Etheridge commenced apparently to buying the stock in and it decreased, and while I do not actually think there were any new purchases by anybody on the outside, I do not know of any, I think the largest amount was immediately thereafter; and the difference between the certificates that were apparently outstanding in her name or that were outstanding in her name at that time, and the total issuance of 5000 shares would give the amount. If you would like to know that, I can get it.

The REFEREE.—What difference does that make?

Mr. REYNOLDS.—We wish to connect up the way in which the preferred stock was handled, wish to show it was substituted for the original certificates for which new certificates were issued. We wish to show the process used.

A. I find certificate stub No. 47 dated January 28, 1920, and issued to Stella M. Etheridge duly receipted by her on the 31st day of January, 1920, calling for 3983 shares; the difference between that the 5000, of course, is 1017 shares; am I correct?

(Testimony of —— Bosworth.)

Q. Yes.

A. Without a close analysis of the account, however, going clear through it, I would not say the difference was all issued to somebody else, but it would be my impression that was the case.

Q. Did the balance represented by this second certificate continue outstanding in her name?

A. The certificate is not in the book.

Q. As far as the stub shows it is still outstanding.

A. Still outstanding.

Q. Do the books of account of the company or any records show any payment or purported payment of the subscription to the common stock to the new corporation except the receipt by the new corporation of the assets of the old?

A. The only entry I have been able to find on the ledger is a debit [86] item to Morris Brothers account of one million dollars which apparently took care of both preferred and common stock. There is nothing further to indicate any payment of any amount for preferred or common stock in that particular entry.

Q. What is the interpretation of that particular entry; does it purport to be on the books of the new company against the old, or was there any change in the books effective?

A. The new books were started on January 1, 1920, and certain entries and accounts appearing in the old ledger do not reappear in the new ledger. There were certain items carried forward, of course,

(Testimony of —— Bosworth.)

from one ledger to the other, but the capital stock on the old ledger appears no longer on the new ledger, and there were certain other entries, perhaps you are not interested in what don't appear. The new ledger simply has the item of $500,000 preferred stock, a credit item, $500,000 common stock, and the offsetting charge and debit item of a million dollars to Morris Brothers, Inc. or some such entry as that. That is an entry to put the books in balance.

Q. There is nothing then appearing on the new records of the books of account to show that the $500,000 in common stock subscription of Stella M. Etheridge was paid up unless it be considered paid by the new company receiving some of the assets of the old company?

A. That is correct. There is no entry showing any further addition to the capital stock or to the capital investment other than just simply a transfer of the business, and you can call it anything you want to, goodwill, fixtures, assets, and so on."

Thereupon upon redirect examination said witness gave the following testimony and none other, and the following proceedings were had and none other, touching the question under discussion:

"Q. Referring to your testimony in reference to the conclusion in [87] reference to the purchase of these bonds by Mrs. Etheridge and the payment for them by the charge against her credit arising

(Testimony of —— Bosworth.)

from the sale of the treasury stock, that this was a fictitious transaction. So far as the entries on the books are concerned, does it not appear that it was an attempt to sell the bonds to Mrs. Etheridge under the guise at least of her furnishing preferred stock to supply these interim holders?

A. If you put it that way, what they tried to make it appear, I would say possibly that was true. That their idea was to set up on the books a fact as if they had purchased from her so much of the preferred stock for which they gave her credit.

Q. In other words, if the fact had been that the preferred stock that she had subscribed for had been *bona fide* and actually paid for so that the corporation had received the real assets representing that subscription, then the entry would correspond to that sort of a transaction?

A. It might be a lawful entry from an accounting standpoint—but it would mean this, the corporation would surrender for her account in a trust fund so much money, which would later be turned over to her, and it could be done in that way.

Q. If I understand you then the basis upon which you say the entry regarded by you as fictitious is that the subscription to the stock by Mrs. Etheridge was either a dummy subscription, or at least a subscription under which it had received no value or payment.

A. Of course the subscription to the capital stock of any corporation has no value other than the willingness of the person subscribing to pay

(Testimony of —— Bosworth.)

for it, but I found no evidence she ever did pay said subscription—other than by the transfer hereinbefore referred to.

Q. And the only supposition under which that could have been paid would be the supposition that the assets of the old corporation [88] were sufficiently above its liabilities to make Mrs. Etheridge's stock in the old corporation worth the amount of her subscription in the new, would it not?

A. That would be the only theory under which you could say that that capital stock was paid because there is no evidence of any other consideration in any shape, form or manner being turned over.

Mr. SMITH.—When you examined the affairs of the corporation after the bankruptcy, did they have any cash on hand?

A. I only know by hearsay. Mr. Withington had that part in charge.

Q. Was there any?

A. Yes, there was some cash on hand I believe.

Q. How much?

A. The report would show that. I do not dare to trust my memory on a matter like cash on hand. The amount shown is $3831.00.

Q. Cash on hand here? A. In the vaults.

Q. In addition to that there was cash on hand in the bank aggregating about $300,000?

A. The bank accounts reconciled show $303,376.96.

(Testimony of —— Bosworth.)

Q. When they closed?

A. As of closing of business this date, the 24th, not the 27th.

Q. From your examination of the assets and the liabilities of the corporation was Morris Brothers Incorporated ever in a position to have declared a dividend whatsoever on their preferred stock?

A. No.

Q. You think the dividends were also fictitious?

A. They were paid out of the capital assets or out of the funds of the other people, customers of the concern, or whatever happened to be handy at the time."

On recross-examination the witness states:

The greater majority of the $303,376 in the bank at the time Morris Brothers closed their doors on December 24th was taken by the banks and applied in payment of the notes they held of Morris [89] Brothers. The banks absorbed what Morris Brothers owed them and covered practically every dollar in any bank except one or two banks they were not able to borrow from, which aggregated proximately $50,000.

"Q. How much was left in the banks that was not absorbed by the banks, if you can tell?

A. $96,183 is the amount here, which includes the cash on hand as well as in the banks."

Testimony of George T. Withington.

Thereafter witness GEORGE T. WITHINGTON was called and testified and gave the following testimony and none other, and the following proceedings were had and none other:

On Direct Examination.

In connection with my work and investigation on assets and liabilities of Morris Brothers, I found bonds in a safe deposit box in the name of Stella M. Etheridge or John L. Etheridge in connection with the transaction—there was $100,000; $75,000 discovered by the district attorney and $25,000 remained in the safe deposit box in bonds. In the safe deposit box were Twin Falls Buhl District bonds $25,000, numbered 281 to 305 inclusive. I do not know their maturity dates.

"Q. Do you know this, were these the same bonds which had, for which the books of the company indicated Mrs. Etheridge had exchanged the Clarke County Bonds which appear on a purchase slip in her favor and apparently paid for or charged to her account against the credit of the preferred stock?

A. There was an exchange took place. Of course I am not entirely satisfied that they were the same bonds, but I think they were. I know there was an exchange of the original bonds delivered to her of $100,000 but just exactly what the change consisted of I cannot recall. My impression is that it was an exchange of Twin Falls for [90] Clarke

(Testimony of George T. Withington.)

County. * * * I have a list prepared by one of our auditors for our own use—15 City of Regina, denomination $1000 * * * This only shows the denomination and serial numbers of the bonds.

Q. What are the other items?

A. $10,000 City of Victoria bonds, denomination $1000 each. $25.00 Caribou, $1000 each. $25,000 Teton County, $1000 each."

On cross-examination the witness states:

"Q. In regard to the $25,000 worth of bonds you located in a safe deposit box, just tell me about that, how they were located and all that you remember about it.

A. We were not able to get into the safe deposit box for some time. Mr. Morris had told us at frequent intervals he had a key and when it was just right he would open that box and we could see what was in it. So one evening Mr. Morris and myself and Walter Evans, the District Attorney, opened that box and listed all the securities and contents of the box and these bonds that I spoke of were among the bonds.

Q. Were there in that safe deposit box other bonds outside of the $25,000 worth?

A. Yes, I believe there were.

Q. Were those other bonds the property of Morris Brothers?

A. Not considered as such, no, sir.

Q. Not considered as such by whom?

(Testimony of George T. Withington.)

A. By myself as an auditor. They were not in the possession of the company and their value was not contained on the books.

Q. In your examination of the books subsequently did you ascertain that these other securities than the $25,000 had been taken out of the assets of Morris Brothers and had never been paid for?

A. They had been paid for in this way. The money had been transferred from the account of Morris Brothers to the account of Stella M. [91] and John L. Etheridge. They had purchased them and the check or money was derived from Morris Brothers.

Q. So as a matter of fact, the condition was that when Etheridge wanted to buy any bonds for himself he would take the money out of the assets of Morris Brothers to pay for the bonds without giving them consideration therefor, considering the bonds as his? A. Yes.

Q. As a matter of fact they always belonged to Morris Brothers? A. Yes.

Q. This money that was diverted by Etheridge, Morris Brothers received no value for it at all?

A. Received nothing for it.

Q. In regard to the $75,000 worth of bonds that were returned from Tacoma; the first time you say you located these they were in the hands of the district attorney? A. Yes, sir.

Q. Is it not true when Mr. Etheridge left here

(Testimony of George T. Withington.)

and went through Tacoma that he himself mailed these bonds back to Fred S. Morris? A. Yes.

Q. And returned them to Fred S. Morris as the property of Morris Brothers?

A. Yes. In fact, within a few hours after taking up the work of the audit, Mr. Morris explained to me personally that these bonds had been shipped by Etheridge to himself, and I was pretty badly stumped to determine what these bonds were doing over at Tacoma and how they got there. I looked at it this way, that if they had shipped $75,000 worth of bonds over to Tacoma, there might be $50,000 worth at Seattle or somewhere else. I subsequently learned the facts from John L. Etheridge himself.

Q. That they were—

A. That Mr. Etheridge was endeavoring to cover up the whole deal in this way; these sales bills and purchase bills were taken from the files and I wanted to find the source of the entry down into the books and I could not find it. After working for several days I happened to say something to Miss Agler and she told me that Mr. Etheridge [92] had frequently had them bring him some of these purchase or sale bills and then he put them away in his private vault. I wanted to know the reason and they told me at the time of state investigation they did not want to have the auditors have too much information and that is why they were removed and that is why the bonds were taken to Tacoma.

(Testimony of George T. Withington.)

Q. So they were simply taken to Tacoma, not because they were considered the personal property of Etheridge or his wife, but because they wanted to stop an investigation that was being made at the time?

A. That is the explanation given me at the time.

Q. That is the information you got not only from the books but from your other investigation of the affairs of Morris Brothers? A. Yes.

Q. Did you ever find out the true reason why the preferred stock was issued to Mrs. Etheridge and thereafter surrendered by her to the corporation?

A. I believe it was one of Mr. Etheridge's financing deals. He described that in the great number of corporations organized by Mr. Morris it was the common practice to issue common stock, say for $500,000 and throw in the preferred stock as a bonus and that is what was done in this case according to his own explanation. The preferred stock was supposed to represent a nonassessable value, something you could not attach, something incorporeal.

Q. Did you in the course of your examination of the books and affairs of Morris Brothers examine the sales slips made to Mrs. Etheridge?

A. Yes.

Q. State whether or not these are true or fictitious entries?

A. So far as the entries are concerned there is nothing fictitious about it but there is no definable or any other kind of value than the mere figures.

(Testimony of George T. Withington.)

Q. Are the figures fictitious?

A. The figures are there but they represent no value. [93]

Q. Make that clear.

A. In other words, if they put an entry through the books for $100,000 wherein that was presumed to be the consideration, and there was no consideration, you could hardly speak of it being a fictitious entry.

Q. But it is not a true story?

A. It would be lacking of consideration.

Q. It would be entirely valueless and without consideration?

A. Yes, but from the entry standpoint, from the manner in which they carried out these transactions. The entry itself would be all right as an entry but there would be no value represented by the figures.

Q. When Mrs. Stella M. Etheridge got credit for $102,200 upon the books had Morris Brothers received anything?

A. They had not received anything tangible except the right to issue preferred stock to interim holders who had bought that stock.

Q. Otherwise Morris Brothers received nothing of value for the credit which Mrs. Etheridge was getting? A. No."

Upon recross-examination the witness continues:

"Q. (Mr. WINTER.) Of the $64,500 of preferred stock, of that, now outstanding, all that

Morris Brothers ever received for that stock was what they received from the present holders?

A. In the way of the purchase of interims?

Q. Yes. A. That is all."

WHEREUPON the claimant Albert C. Smith prays that the above and foregoing statement be settled as a full, true and correct statement of the evidence upon the appeal by him, and a full, true and correct statement of all the evidence and of all the persons necessary to illustrate the points designated in this abbreviated statement of the case.

Dated December 11, 1922.

L. A. McNARY,
I. N. SMITH and
JOHN W. REYNOLDS,
Attorneys for Albert C. Smith, Claimant and Appellant. [94]

Service of the above and foregoing proposed statement of the case by appellant Albert C. Smith is admitted at Portland, Oregon, this 15th day of January, 1923.

J. P. WINTER,
Attorney for Trustee.

It is hereby stipulated and agreed by and between the attorneys for the respective parties, to wit, by the attorneys for Albert C. Smith, appellant, and by the attorney for the trustee in bankruptcy of the estate of Morris Brothers, a bankrupt, that the above and foregoing proposed statement of the case contains a full, true and correct

transcript and record of all the evidence and proceedings had at the hearing of the above cause before the Referee in Bankruptcy and on appeal to the District Court of the United States for the District of Oregon, and that the same may be signed, sealed and settled as a true, correct, full and complete statement of the case to be used on said appeal.

Dated at Portland, Oregon, this 27th day of March, 1923.

I. N. SMITH,
L. A. McNARY and
JOHN W. REYNOLDS,
Attorneys for Albert C. Smith.
J. P. WINTER,
Attorney for Trustee. [95]

Certificate of Judge to Statement of Evidence.

I, Charles E. Wolverton, Judge of the District Court of the United States for the District of Oregon, who tried the above cause, do hereby certify that the above and foregoing statement of the case contains a full, true and correct transcript of the testimony and proceedings had at the hearing on review of the decision of the Referee in the matter of Morris Brothers, Inc., a bankrupt, relating to the claim of Albert C. Smith, and that said statement contains all the records and proceedings necessary to illustrate and illuminate the various contentions of the parties on the points made by the appellant in this appeal.

I further certify that said statement of the evidence contains the proposed statement as made by appellant Albert C. Smith and all amendments thereto which were allowed.

Dated Portland, Oregon, January 29, 1923.

CHAS. E. WOLVERTON,
Judge.

Filed March 29, 1923. G. H. Marsh, Clerk. [96]

AND AFTERWARDS, to wit, on the 29th day of March, 1923, there was duly filed in said court, a praecipe for transcript, in words and figures as follows, to wit: [97]

In the District Court of the United States for the District of Oregon.

No. B—5653—IN BANKRUPTCY.

APPEAL OF ALBERT C. SMITH.

In the Matter of MORRIS BROTHERS, INC., Bankrupt.

Praecipe for Transcript of Record.

To the Honorable Clerk of said Court:

Please include in the transcript of record in the above-entitled appeal the following:

1. Citation on appeal, with proof of service.
2. Petition and amended claim of Albert C. Smith.
3. Answer and objections by Trustee.
4. Decision of Referee.
5. Petition for review.

6. Opinion of District Court.
7. Judgment order of District Court.
8. Petition for appeal with order allowing same.
9. Assignment of errors.
10. Appeal bond and approval.
11. Statement of evidence.
12. All orders extending time.
13. This praecipe, with proof of service.

I. N. SMITH,
L. A. McNARY and
JOHN W. REYNOLDS,
Attorneys for Appellant.

State of Oregon,
County of Multnomah,—ss.

Due service of the within praecipe is hereby accepted in Multnomah County, Oregon, this 23d day of March, 1923, by receiving a copy thereof, duly certified to as such by John W. Reynolds, one of the attorneys for appellant.

J. P. WINTER,
Attorney for Trustee.

Filed March 29, 1923. G. H. Marsh, Clerk. [98]

Certificate of Clerk U. S. District Court to Transcript of Record.

United States of America,
District of Oregon,—ss.

I, G. H. Marsh, Clerk of the District Court of the United States for the District of Oregon, do hereby certify that the foregoing pages, numbered from 2 to 98, inclusive, constitute the transcript of

record upon appeal in a case in said court of Morris Brothers, Inc., Bankrupt, in which A. C. Smith is appellant and Earl C. Bronaugh, Trustee in Bankruptcy of the Estate of Morris Brothers, Inc., Bankrupt, is appellee; that the said transcript has been prepared by me in accordance with the praecipe for transcript filed by said appellant and is a full, true, and complete transcript of the record of proceedings had in said court in said cause in accordance with the said praecipe as the same appear of record and on file at my office and in my custody.

I further certify that the cost of the foregoing transcript is $28.60, and that the same has been paid by the said appellant.

I return, with the said transcript attached thereto, the original citation in said cause.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at Portland, in said district, this 21st day of May, 1923.

[Seal] G. H. MARSH,
Clerk. [99]

[Endorsed]: No. 4043. United States Circuit Court of Appeals for the Ninth Circuit. In the Matter of Morris Brothers, Inc., Bankrupt. Albert C. Smith, Appellant, vs. Earl C. Bronaugh, Trustee in Bankruptcy of the Estate of Morris Brothers, Inc., Bankrupt, Appellee. Transcript of Record.

Upon Appeal from the United States District Court for the District of Oregon.

Filed June 2, 1923.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk. [100]

In the District Court of the United States for the District of Oregon.

May 24, 1923.

No. B—5653.

In the Matter of MORRIS BROTHERS, INC., Bankrupt.

Order Extending Time to and Including June 15, 1923, to File Record and Docket Cause.

Now, at this day, for good cause shown, it is ORDERED that the time within which to file the transcript of record in the above-entitled cause, on the appeal of A. C. Smith, and to docket the same in the United States Circuit Court of Appeals, be and the same is hereby extended to and including June 15, 1923.

R. S. BEAN,
Judge.

[Endorsed]: No. 4043. United States Circuit Court of Appeals for the Ninth Circuit. Order Under Subdivision 1 of Rule 16 Enlarging Time to and Including June 15, 1923, to File Record and Docket Cause. Filed June 2, 1923. F. D. Monckton, Clerk. By Paul P. O'Brien, Deputy Clerk. [101]

No. 4043

UNITED STATES
CIRCUIT COURT of APPEALS

FOR THE NINTH CIRCUIT

In the Matter of MORRIS BROTHERS, INC., Bankrupt.

ALBERT C. SMITH,

Appellant,

vs.

EARL C. BRONAUGH, Trustee in Bankruptcy of the Estate of MORRIS BROTHERS, INC., Bankrupt,

Appellee.

APPELLANT'S BRIEF

Upon Appeal from the United States District Court for the District of Oregon.

I. N. Smith, L. A. McNary and John W. Reynolds,
Attorneys for Appellant.

John P. Winter,
Attorney for Respondent.

FILED

INDEX TO AUTHORITIES.

Page

Anthony v. Household Sewing Machine Co., 16 R. I. 571 ---------- 15

Angel v. Chicago R. Co., 151 U. S. 1; 14 Sup. Ct. Rep. 240 ---------- 26

Arnold, In re, 133 Fed. 789----------

Bankruptcy Act, Secs. 66, 67 (a)---------- 22

Bradley v. Poole, 89 Mass. 169---------- 12

Boston Ice Co. v. Potter, 123 Mass. 28; 25 Am. Rep. 9 ---------- 21

Boulton v. Jones, 2 H. & N. 564; 157 Reprint 232- 21

Brown, In re, 171 Fed. 254---------- 33

Crawford v. Burke, 195 U. S. 176---------- 14

13 Corpus Juris, 378 ---------- 21

14 Corpus Juris, 593 ---------- 12

14 Corpus Juris, 530 ---------- 15

Clark v. Turner, 73 Ga. —---------- 1

Consumers Ice Co. v. Webster, 32 App. Div. 592; 53 N. Y. S. 56---------- 26

Clough v. Dawson, 69 Ore. 52---------- 26

Corsicana Nat'l Bank v. Johnson, 251 U. S. 68---- 36

Clark & Marshall, Corporations, Sec. 3421, p. 995 36

Duell v. Hollins, 36 Sup. Ct. Rep. 615; 241 U. S. 523 ---------- 33

Draper v. Stone, 71 Me. 177 ---------- 33

Eby v. Waltz, 286 Fed. 924---------- 34

Florida Land Imp. Co. v. Merrill, 52 Fed. 135---- 17

Foundations of Legal Liability, Street------ 11- 12

Felix v. Patrick, 145 U. S. 317---------- 26

Ferchen v. Arndt, 26 Ore. 121-128---------- 31

Filer, In re, 125 Fed. 261 ---------- 14
Hamilton Bros. (Mich.) 121 N. W. 731 ---------- 13
In Re
Arnold, 133 Fed. 789 ---------- 14
Filer, 125 Fed. 261 ---------- 14
Brown, 171 Fed. 254 ---------- 33
McIntire, 181 Fed. 960 ---------- 34
Smith, 278 Fed. 844 ---------- 34
Independent Storage Co. v. Iona Merc. Co., 179 N. W. 157 ---------- 16
Johns v. Coffey, 74 Wash. 189; 133 Pac. 4 ---------- 17
Kampman v. Traver, 87 Tex. 491 ---------- 16
Lowell v. Brown, 280 Fed. 193 ---------- 27
Mack v. Latta, 178 N. Y. 525 ---------- 13
Marion Trust Co. v. Bennett, 82 N. E. 782 ---------- 16
Merrill v. Florida Land Imp. Co., 60 Fed. 18 ---------- 17
Moore v. Crawford, 130 U. S. 122; 9 Sup. Ct. Rep. 447 ---------- 26
McIntire, In re, 181 Fed. 960 ---------- 34
Newton National Bank v. Newbegin, 74 Fed. 135 17
Parrish v. Parrish, 33 Ore. 486-490 ---------- 26
Perry on Trusts (6th Ed.) Par. 166 ---------- 24
People v. Cal. Safe Dep. Co., 19 Cal. App. 414; 126 Pac. 516 ---------- 17
Pimental v. San Francisco, 21 Cal. 351 ---------- 13
Pomeroy Equity Juris. (4th Ed.) Par. 1044 ---------- 25
Pomeroy Equity Juris. (4th Ed.) Par. 1047 ---------- 26
Pomeroy Equity Juris. (4th Ed.) Par. 1053 ---------- 26
Perry on Trusts (6th Ed.) Par. 828 ---------- 32
Perry on Trusts (6th Ed.) Par. 844 ---------- 33

Reynolds v. N. Y. Trust Co., 188 Fed. 611_____
Schall v. Camors, 251 U. S. 239_____ 14
Schierenberg v. Stephens, 32 Mo. App. 314___ 13- 15
Scovill v. Thayer, 105 U. S. 153_____ 16
Stufflebeam v. DeLashmutt, 83 Fed. 499_____ 17
Springer v. Young, 14 Ore. 280_____ 26
Schwartz v. Gerhardt, 44 Ore. 425_____ 29
Smith, In re, 278 Fed. 844_____ 34
Wagner v. U. S. National Bank, 63 Ore. 299_____ 12
Woodward v. Groner, 89 Am. Dec. 477_____ 13
Wheeler v. Sage, 1 Wall. 518_____ 26

TOPICAL INDEX.

Page
Assignments of Error_____ 9
Argument _____ 9- 37
Fraud, As Basis for Constructive Trust_____ 23- 27
Identification of Trust Fund_____ 27- 37
Money Had and Received_____ 11- 13
Provable Claim in Bankruptcy_____ 13- 23
Statement _____ 1- 9

INDEX TO AUTHORITIES.

Page

Anthony v. Household Sewing Machine Co., 16 R. I. 571 ---- 15

Angel v. Chicago R. Co., 151 U. S. 1; 14 Sup. Ct. Rep. 240 ---- 26

Arnold, In re, 133 Fed. 789----

Bankruptcy Act, Secs. 66, 67 (a)---- 22

Bradley v. Poole, 89 Mass. 169---- 12

Boston Ice Co. v. Potter, 123 Mass. 28; 25 Am. Rep. 9 ---- 21

Boulton v. Jones, 2 H. & N. 564; 157 Reprint 232_ 21

Brown, In re, 171 Fed. 254---- 33

Crawford v. Burke, 195 U. S. 176---- 14

13 Corpus Juris, 378 ---- 21

14 Corpus Juris, 593 ---- 12

14 Corpus Juris, 530 ---- 15

Clark v. Turner, 73 Ga. —---- 1

Consumers Ice Co. v. Webster, 32 App. Div. 592; 53 N. Y. S. 56---- 26

Clough v. Dawson, 69 Ore. 52---- 26

Corsicana Nat'l Bank v. Johnson, 251 U. S. 68---- 36

Clark & Marshall, Corporations, Sec. 3421, p. 995 36

Duell v. Hollins, 36 Sup. Ct. Rep. 615; 241 U. S. 523 ---- 33

Draper v. Stone, 71 Me. 177 ---- 33

Eby v. Waltz, 286 Fed. 924---- 34

Florida Land Imp. Co. v. Merrill, 52 Fed. 135---- 17

Foundations of Legal Liability, Street---- 11- 12

Felix v. Patrick, 145 U. S. 317---- 26

Ferchen v. Arndt, 26 Ore. 121-128---- 31

Filer, In re, 125 Fed. 261 14
Hamilton Bros. (Mich.) 121 N. W. 731 13
In Re
Arnold, 133 Fed. 789 14
Filer, 125 Fed. 261 14
Brown, 171 Fed. 254 33
McIntire, 181 Fed. 960 34
Smith, 278 Fed. 844 34
Independent Storage Co. v. Iona Merc. Co., 179 N. W. 157 16
Johns v. Coffey, 74 Wash. 189; 133 Pac. 4 17
Kampman v. Traver, 87 Tex. 491 16
Lowell v. Brown, 280 Fed. 193 27
Mack v. Latta, 178 N. Y. 525 13
Marion Trust Co. v. Bennett, 82 N. E. 782 16
Merrill v. Florida Land Imp. Co., 60 Fed. 18 17
Moore v. Crawford, 130 U. S. 122; 9 Sup. Ct. Rep. 447 26
McIntire, In re, 181 Fed. 960 34
Newton National Bank v. Newbegin, 74 Fed. 135 17
Parrish v. Parrish, 33 Ore. 486-490 26
Perry on Trusts (6th Ed.) Par. 166 24
People v. Cal. Safe Dep. Co., 19 Cal. App. 414; 126 Pac. 516 17
Pimental v. San Francisco, 21 Cal. 351 13
Pomeroy Equity Juris. (4th Ed.) Par. 1044 25
Pomeroy Equity Juris. (4th Ed.) Par. 1047 26
Pomeroy Equity Juris. (4th Ed.) Par. 1053 26
Perry on Trusts (6th Ed.) Par. 828 32
Perry on Trusts (6th Ed.) Par. 844 33

Reynolds v. N. Y. Trust Co., 188 Fed. 611_____
Schall v. Camors, 251 U. S. 239_____ 14
Schierenberg v. Stephens, 32 Mo. App. 314___ 13- 15
Scovill v. Thayer, 105 U. S. 153_____ 16
Stufflebeam v. DeLashmutt, 83 Fed. 499_____ 17
Springer v. Young, 14 Ore. 280_____ 26
Schwartz v. Gerhardt, 44 Ore. 425_____ 29
Smith, In re, 278 Fed. 844_____ 34
Wagner v. U. S. National Bank, 63 Ore. 299_____ 12
Woodward v. Groner, 89 Am. Dec. 477_____ 13
Wheeler v. Sage, 1 Wall. 518_____ 26

TOPICAL INDEX.

Page
Assignments of Error_____ 9
Argument _____ 9- 37
Fraud, As Basis for Constructive Trust_____ 23- 27
Identification of Trust Fund_____ 27- 37
Money Had and Received_____ 11- 13
Provable Claim in Bankruptcy_____ 13- 23
Statement _____ 1- 9

No. 4043

UNITED STATES

CIRCUIT COURT of APPEALS

FOR THE NINTH CIRCUIT

In the Matter of MORRIS BROTHERS, INC., Bankrupt.

ALBERT C. SMITH,

Appellant,

vs.

EARL C. BRONAUGH, Trustee in Bankruptcy of the Estate of MORRIS BROTHERS, INC., Bankrupt,

Appellee.

APPELLANT'S BRIEF

Upon Appeal from the United States District Court for the District of Oregon.

I. N. Smith, L. A. McNary and John W. Reynolds,
Attorneys for Appellant.

John P. Winter,
Attorney for Respondent.

Albert C. Smith *vs.*

STATEMENT.

The claim of appellant Albert C. Smith was presented against the bankrupt estate of Morris Brothers, Inc., and, upon objections filed by the Trustee, was heard before the Referee and entirely disallowed. The claim was for money of which claimant had been defrauded through misrepresentations and pretended sale to him of preferred stock in Morris Brothers, Inc. Claimant tendered his worthless stock certificates for cancellation and claimed two thousand dollars ($2,000.00) of which he had been defrauded, with interest thereon, and also asked that he be awarded a lien on certain bonds and their proceeds which he identified as representing the funds so obtained from himself and from certain others by the same fraudulent means. The decision of the Referee was, on claimant's petition, reviewed by the District Court for the District of Oregon, Honorable Charles E. Wolverton presiding, and was modified. The claim was allowed, but the lien on specific bonds and other proceeds was denied, and it was decreed that appellant's claim should be deferred in payment until all general claims not of this same class should be paid in full. From this decision the claimant appeals to this Honorable Court.

The facts upon which Smith's claim were based are so clear as to be beyond dispute. A brief statement of them will be necessary of an understanding of claimant's position and of the Court's decision.

On or about the 31st day of July, 1919, Smith was approached by the agent of Morris Brothers, Inc.,

and was solicited to purchase preferred stock of Morris Brothers, Inc., and it was falsely stated to Smith

1st: That there was fully paid, common stock of the company, aggregating $500,000.00, and that the company had that much assets in cash or its equivalent.

2nd: That the company was a prosperous, going concern, able to pay to claimant as dividends on preferred stock, at least as large returns as claimant was then receiving on certain municipal bonds, which claimant owned, which bonds were presently maturing.

3rd: That because the company was in such prosperous condition, the preferred stock of the company was better as an investment than the municipal bonds then owned by claimant.

4th: That such preferred stock could be easily sold and would pay 8 per cent per annum dividends, of which 6 per cent dividends were guaranteed.

5th: That when the preferred stock was fully sold the company's paid-up capital would be $1,000,000.00.

The truth concerning such representations was not discovered or discoverable by claimant until **after** the filing of the involuntary petition in Bankruptcy against the company, as the certificate of preferred stock in the NEW corporation — Morris Brothers, Inc.—provides.

(Transcript, 66): **"It is expressly stipulated and agreed by and between the holders of preferred stock and Morris Brothers, Inc., that the holders of pre-**

ferred stock shall have no vote in the corporation."

And further, because Smith was paid money as **"dividends"** on the preferred stock, while he held only an interim certificate therefor, and also after the stock was delivered to him, thereby lulling him with a sense of security as to his investments.

After the petition in Bankruptcy was filed, Smith then first learned of the true facts, which are and were:

1st: That Morris Brothers, Inc. (the old company) was in existence when his dealings for preferred stock began, but it was not authorized to issue or sell preferred stock at all.

2nd: That the company never had but $100,000.00 of common stock, which at one time was fully paid, but which, at the time of initiating the transaction under consideration, had been entirely depleted so that there was no stock whatsoever, fully paid, as will hereafter more fully appear.

3rd: That while petitioner believed and was induced to believe that he was procuring stock in Morris Brothers, Inc. (the original company) —a prosperous, going concern—he was delivered stock in Morris Brothers, Inc. (a new corporation) which was insolvent at the date of its incorporation, and at all times thereafter.

4th: That no stock whatsoever of the new corporation was ever paid for in money or in money's worth, unless with the money of claimant and other defrauded parties.

5th: That the pretended "dividends" paid upon the interim certificates and preferred stock in the new corporation were not dividends at all, and that the new corporation never had any surplus or moneys from which to pay any dividends, but that such pretended "dividends" were paid to claimant and other holders of such preferred stock, to further the fraudulent scheme alleged in the petition.

It was shown that these false representations were made in accordance with information furnished the solicitor by John L. Etheridge, president and managing head of the corporation, and it was further shown in corroboration of the authority given the solicitor to make such statements, that the same representations were being made to other persons by John L. Etheridge directly and in person. Smith relied upon these false representations and paid to Morris Brothers, Inc., $2,000.00, supposing that he was making a purchase of that amount par value of preferred stock of Morris Brothers, Inc., having paid up capital from common stock of $500,000.00, which would be an equity supporting and giving security and value to the preferred stock. Smith also supposed that the stock he was buying was stock of the old Morris Brothers, Inc., with which he had previously had dealings and that Fred Morris was connected with the management thereof. It appeared, however, and was first disclosed after the bankruptcy that Fred Morris, while ostensibly connected with the corporation, was in fact no longer a stock-

holder and did not participate in the management. It further appears that on February 21st, 1919, the liabilities of the corporation already exceeded its assets and in addition thereto on that day the entire paid-up capital of $100,000.00 previously existing was depleted and rendered valueless, because on that day Fred S. Morris and Henrietta A. Morris, holding all of the stock of the corporation except nominal and qualifying shares, withdrew assets representing all of the capital stock which ever had been paid up in the corporation to the value of one hundred thousand dollars ($100,000.00), and that this was done by the corporation providing one hundred thousand dollars ($100,000.00) to be used by Stella M. Etheridge in purchasing the capital stock of Fred S. and Henrietta A. Morris, that this transaction had been carried out with guile and secrecy, and was concealed from appellant Smith, and all other persons similarly situated. The corporation was thus rendered insolvent to a still greater extent, and that from said date the concern never was solvent, even to the date of the bankruptcy proceedings now pending.

It appears that on September 6, 1919, and some time after the spurious sale of preferred stock to the claimant, Morris Brothers, Inc., went through the form of dissolving the old corporation and filing new articles under the identical name, providing for an authorized capital stock of five hundred thousand dollars ($500,000.00) common stock and five hundred thousand dollars ($500,000.00) preferred stock, and that all of the common stock except two qualify-

ing shares of one hundred dollars ($100.00) each was subscribed by Stella M. Etheridge, and that all of the preferred stock, without exception, was subscribed by Stella M. Etheridge; that the other officers and directors, Forbes B. Pratt and John L. Etheridge, remained the same in the new company as in the old; that the corporate purposes were the same; that no payment of stock subscriptions of the new corporation was made except by a resolution adopted by the old corporation and by the new corporation, whereby the assets and business of the old corporation were taken over by the new corporation at a valuation of one million dollars ($1,000,000.00).

It further appears that the books of account of the old corporation were continued without interruption as the books of the new corporation until about January 1, 1920. It is clear, also, not only that no attempt was made to actually furnish any new capital on reorganization as representing the common stock, but that Stella M. Etheridge was a dummy subscriber, and that she had no means which could be relied upon for any part of her subscription, and if she had anything whatever aside from her holding stock of the old corporation she was not advised of it, but said on the witness stand that she did not know what, if any, property she had, due to the fact that her husband had handled property under her name, and that she knew nothing of business, and that in all matters she had merely signed such papers as her husband had told her were to be signed.

On or about January the 13th, 1920, a certificate of preferred stock was delivered to claimant Smith, but Smith was still under the effects of the original misrepresentation, was without further information or means of knowledge as to the condition of the company, and had not learned of the falsity of any of the representations made to him; had, on the contrary, been further deceived by being paid pretended dividends exceeding the amount called for by his preferred stock and while he held only an interim certificate therefor, which "dividend payments" were made when Morris Brothers had no profits or surplus out of which to pay the same, but was, as stated, continuously insolvent. **Smith had no vote or participation in the affairs of the company, as the certificate of stock delivered to him, deprived him of that right, nor had he any knowledge of the true state of facts, nor reason to suspect any of the facts were not as represented to him.**

Morris Brothers, Inc., after obtaining Smith's money by fraud and misrepresentation, as aforesaid, dealt with the same as follows, which is the basis of appellant's claim that it is possible to trace and identify, in the hands of the Trustee, property which represents the proceeds of these ill-gotten gains. Whenever a sale occurred of this fictitious stock to the various defrauded purchasers, including Smith, a distinct ledger account was credited with the sums so realized under the heading "Morris Brothers' Preferred 6's." The item of credit arising from Smith's transaction is identified.

On January 12, 1920, the credit arising from these sales amounted to one hundred two thousand, two hundred dollars ($102,200.00). Mrs. Etheridge, being the nominal subscriber and holder of all of the preferred stock of the new or second corporation, was ready to and did turn back to the corporation exactly sufficient shares of preferred stock to satisfy the sales to customers, and the amount realized up to that time and standing to the credit of "Morris Brother's Preferred 6's," to-wit, one hundred two thousand, two hundred dollars ($102,200.00), which included claimant's two thousand dollars ($2,000.00), was credited to Stella M. Etheridge, who promptly withdrew bonds in satisfaction thereof, which bonds are described in Smith's amended claim and petition, and were surrendered by John L. and Stella M. Etheridge to the Trustee, and said bonds, or the proceeds thereof, are admittedly now in the possession of the Trustee and under the control of this court, and the amount thereof exceeds the amount of preferred stock fraud claims, the entire preferred stock claims being now sixty-four thousand, five hundred dollars ($64,500.00).

The decree of the Honorable District Court was as follows:

"On consideration whereof, it is now ordered and adjudged that the order of the Referee in disallowing and denying the claim of the petitioner as a preferred claim is hereby affirmed.

And it is further ordered, however, that the order of the said Referee in disallowing said claim entirely

be and the same is hereby modified, and it is ordered and adjudged that the petitioner's claim in the sum of $2,000.00, with interest thereon from the 31st day of July, 1919, at the rate of 6 per cent per annum, less $146.67, be allowed, subject, however, first, to the payment in full of the claims of general creditors and all other claims filed and allowed against said estate, excepting only those of the nature of petitioner's claim, and it is further ordered that no part of petitioner's claim be paid until said other claims have been paid in full."

ERRORS ASSIGNED.

The errors assigned (Transcript of Record, page 54) are the following:

1. That the United States District Court for the District of Oregon erred in not decreeing to claimant a lien for the amount of his claim against and upon the specific assets or proceeds thereof described in his claim and petition as prayed for by said claimant, and in affirming the Referee's order denying such lien.

2. That the United States District Court for the District of Oregon erred in decreeing that the claim allowed petitioner be subordinated to the payment in full of the claims of general creditors.

ARGUMENT.

The questions actually involved in the appeal are:

First. Do the facts shown by appellant constitute a tracing or identification of trust funds, the trust arising ex maleficio and the identification resting upon the segregation of assets in the manner stated?

Second. The appellant having been awarded his claim against the bankrupt estate, but being denied his lien on specific assets, is he entitled to share equally with other creditors or is he subject to being placed in a deferred class and postponed in payment to other general creditors?

In order to present properly these two questions, it will be necessary to state rather completely but briefly the theory upon which appellant's claim is based, even though it involves a restatement of propositions favorably held by the Honorable District Court. For, while the District Court reached the conclusion that appellant Smith was entitled to have his claim allowed, and thereby classed him as a creditor and not a stockholder, the Court denied him the logical and necessary consequence of that decision by ordering a discrimination against his claim in the payment of dividends. In making this discrimination the Court acted upon reasons which were urged against any allowance of the claim, but which when the claim was once allowed, could have no proper application because of the fixed rule of distribution provided by the Bankruptcy Act. Since no appeal has been taken by the trustee, the allowance of the claim is beyond controversy. Our statement of the grounds and authorities for the claim's allowance is for the purpose of showing how the Court came to a correct decision on the real issue and yet lapsed into error in the decree. The appellant presented his claim, relying upon the following propositions:

First: That the fraud whereby his property was acquired by the bankrupt corporation charged the corporation with the obligation to return the same, which could be enforced by the so-called equitable action of money had and received.

Second: That such a claim for money had and received, though arising out of fraud, yet not being a claim for damages, is provable in bankruptcy, and if the claimant fails to trace the property under a constructive trust the claim would, nevertheless, be allowable as a general claim.

Third: That the fraud committed by the bankrupt in this case impresses a constructive trust upon the property obtained from the claimant.

Fourth: That claimant has traced and identified the property in which the trustee's estate is enriched by the fraud committed upon claimant and others in like situation, and is entitled to have repayment out of the proceeds thereof prior to general creditors.

Liability for Money Had and Received.

The nature of the liability for money had and received arising out of a tort as distinguished from a claim for damages is well stated in Vol. III, Street's Foundations of Legal Liability, pages 199-200, as follows:

> "On general principle the rule is, that whenever one person commits a wrong or tort against the property of another, with the result of benefiting his own estate, the law will, at the election of the party injured, impose a contractual duty on the wrong-doer to pay the party injured the full value of the property appropriated; and this

duty may be enforced by the action of indebitatus in some of its forms. The proposition just stated indicates the point beyond which the fiction of contract cannot be indulged. No form of indebitatus will lie to recover damages for a merely destructive trespass. It is essential that there should be an unjust enrichment of the estate of the tortfeasor."

The same author, in Vol. III, at page 193, quotes from Lord Mansfield's opinion in Moses vs. Macferlan, 2 Burr. 1005, as follows:

"This kind of equitable action, to recover back money, which ought not in justice to be kept, is very beneficial, and therefore much encouraged. It lies only for money which, **ex aequo et bono,** the defendant ought to refund. . . . But it lies for money paid by mistake; or upon a consideration which happens to fail; or for money got through imposition (express or implied), or extortion, or oppression, or an undue advantage taken of the plaintiff's situation, contrary to laws made for the protection of persons under those circumstances. In one word, the gist of this kind of action is, that the defendant upon the circumstances of the case is obliged by the ties of natural justice and equity to refund the money."

It will be sufficient on this point to cite:

14 Corpus Juris, 593;

Wagner v. U. S. National Bank, 63 Or. 299;

Bradley v. Poole, 89 Mass. 169;

Woodward v. Groner, 89 Am. Dec. 477;
Hamilton v. Bean Co. (Mich.), 121 Northwestern, 731;
Mack v. Latta, 178 N. Y. 525;
Schierenberg v. Stephens, 32 Mo. App. 314;
Pimental v. San Francisco, 21 Calif. 351.

In the case of Wagner v. U. S. National Bank, supra, the Oregon Court explains the manner in which things other than money, to-wit, checks and whatever is accepted and regarded as a money credit will support the action.

It is clear that Smith, when his money was obtained by Morris Brothers, did not become a stockholder, because **there was and could be no such thing in existence as preferred stock in such corporation, and his money having been obtained through fraud and imposition, he was entitled to recover the same in the form of money had and received.**

Such Claim is Provable in Bankruptcy.

It is established law that a claim for money had and received, based as it is on a quasi contract, is a provable debt against a bankrupt estate, and the fact that it originates in fraud whereby the bankrupt obtains the claimant's money does not prevent its being a provable debt. The Supreme Court of the United States has so held in a case where a broker had sold a customer's stock and converted the proceeds and by falsely representing they were still carrying the stock, obtained from him further sums of money. The Court says:

"We are clear that the debt of the plaintiff is embraced within the provision of Par. a (Sec. 63 of Bankruptcy Act) as one 'founded upon an open account or upon a contract express or implied,' and might have been proved under Par. 63 a had plaintiff chosen to waive the tort, and take his place with the other creditors of the estate." Crawford v. Burke, 195 U. S. 176; 25 Sup. Ct. 9; Schall v. Camors, 251 U. S. 239; 40 Sup. Ct. 135; Reynolds v. N. Y. Trust Co., 188 Fed. 611; 26 Am. B. R. 698; In re Arnold, 133 Fed. 789; 13 Am. B. R. 320; In re Filer, 125 Fed. 261; 5 Am. B. R. 582.

Nor is the fraud which was practiced upon the claimant here any different in character from the fact that it related to a proposed sale of stock to him. There was no such thing as the stock referred to, nor did he ever become in fact a stockholder, or waive any rights, or estop himself in any manner from making this claim. For at the time the pretended certificate of stock was delivered to him in January, 1920, he still knew nothing of the facts, nor of the deceit which had been practiced, nor was the pretended stock certificate even in the same company he supposed he was dealing with, nor in a company in which the conditions were as represented. It is not shown that any credit was given to Morris Brothers by any person now a creditor of the bankrupt estate with knowledge that this pretended stock had been sold to Smith, but on the contrary, the corporation was posing as a one-million-dollar

($1,000,000.00) corporation, and its representations to the public did not descend to such small details as the persons and amounts involved in these fraudulent stock sales. Neither is this a case in which a person was induced to become a stockholder in a corporation which thereafter became insolvent, for here the insolvency existed all the time involved in our inquiries. If any discrimination then be made against the claimant, subordinating his claim to that of general creditors, such discrimination must be an illogical one based upon the kind of spurious paper handed him by the bankrupt. Such a discrimination would mean that the bankrupt, by handing him a white slip in defrauding him, places him in the rank of general creditors, while in handing him a yellow slip it places him in a new class of creditors who may be termed debarred creditors. (For in bankruptcy a creditor postponed till all general claims are paid in full, will always receive nothing.)

The principle is the same as when a corporation takes subscriptions to unauthorized stock. Such subscriptions are absolutely void, and cannot be collected against the subscriber, even though the stock is afterwards authorized. If the stock be issued, it gives neither the rights nor liabilities of stockholders, and if the stock be paid for, the holder becomes a creditor for money had and received, and not a stockholder.

14 Corpus Juris, 530;
Schierenberg v. Stephens, 32 Mo. App. 314;
Anthony v. Household Sewing Machine Co.,

16 R. I. 571;
Scovill v. Thayer, 105 U. S. 143;
Grangers Insurance Co. v. Kamper, 73 Ala. 325;
Clark v. Turner, 73 Ga. 1;
Marion Trust Company v. Bennett, 169 Ind. 346; 82 Northeastern, 782;
Kampman v. Tarver, 87 Tex. 491;
Independent Storage Co. v. Iowa Merc. Co., 179 N. W. 157.

In England, influenced largely by the Companies' Act, which requires a public register to be kept of the stockholders of companies so that the public may know upon whose liability they are relying in dealing with a corporation, it has been held that after bankruptcy or insolvency proceedings the status of a stockholder is fixed, and he cannot then rescind or change his position, even though he may have been induced to become a stockholder by fraud. But in the United States each case depends upon its own facts, and bankruptcy proceedings or other insolvency proceedings are not an absolute bar, but the questions involved are the questions of whether the stockholder has participated in the management, or by laches lost the right to rescind, or whether credit has been given to the corporation by persons relying upon his being a stockholder. And though some American cases say that bankruptcy is a bar, careful examination shows that the other grounds were

always present.

People v. California Safe Deposit Co., 19 Cal. App. 414; 126 Pac. 516;

Johns v. Coffey, 74 Wa. 189; 133 Pac. 4;

Stufflebeam v. DeLashmutt, 83 Fed. 449 (Oregon District, Judge Bellinger);

Newton National Bank v. Newbegin, 74 Fed. 135;

Merrill v. Florida Land Improvement Co., 60 Fed. 18;

Florida Land Improvement Co. v. Merrill, 52 Fed. 77.

The Honorable District Court in the case at bar reviewed the reasoning of the cases in which participation in the management, laches in discovering the fraud or in acting after its discovery, and incurring of indebtedness by the corporation while the party was a stockholder, are given as grounds for denying relief to a defrauded stockholder on the basis of estoppel and quoted particularly from Newton National Bank v. Newbegin, 74 Fed. 135, 140, as follows:

> "There are obvious reasons why a shareholder of a corporation should not be released from his subscription to its capital stock after the insolvency of the company, and particularly after a proceeding has been inaugurated to liquidate its affairs, unless the case is one in which the stockholder has exercised due diligence, and

in which no facts exist upon which corporate creditors can reasonably predicate an estoppel. When a corporation becomes bankrupt, the temptation to lay aside the garb of a stockholder, on one pretense or another, and to assume the role of a creditor, is very strong, and all attempts of that kind should be viewed with suspicion. If a considerable period of time has elapsed since the subscription was made; if the subscriber has actively participated in the management of the affairs of the corporation; if there has been any want of diligence on the part of the stockholder, either in discovering the alleged fraud, or in taking steps to rescind when the fraud was discovered; and, above all, if any considerable amount of corporate indebtedness has been created since the subscription was made, which is outstanding and unpaid,—in all of these cases the right to rescind should be denied, where the attempt is not made until the corporation becomes insolvent. But if none of these conditions exist, and the proof of the alleged fraud is clear, we think that a stockholder should be permitted to rescind his subscription as well after as before the company ceases to be a going concern."

The above quotation should be read in the sense of the early portion, to-wit, "Unless the case is one in which the stockholder has exercised due diligence, and in which **no facts exist upon which corporate**

creditors can reasonably predicate an estoppel."

Now the only basis of estoppel depending upon the incurring of indebtedness while claimant was a stockholder would be that the creditors relied upon claimant as a stockholder. But as appears from the statement of the evidence, there is no evidence to show that any creditor of the corporation knew of the transactions by which Smith received the preferred stock, or of his holding preferred stock, until after the bankruptcy. (Transcript of Record, p. 88.)

The Court expressly acquits us of laches, and so far as it concerns vote or voice in the management, the terms of the preferred stock certificate already quoted shows that was forbidden.

If it be held that the technical status of a stockholder attributed to Smith is a just basis for discrimination against him in favor of ordinary creditor claimants, then our position is that Smith never was a stockholder. We have at all times maintained that Smith never became a stockholder at all, even as a voidable status. Let us consider for a moment that question. First, it is too clear to admit of doubt and is not controverted by the trustee that he did **not become a stockholder at the time his money was fraudulently obtained from him; that he could not have become a stockholder at that time, for the reason that there was no such stock in existence or possible to be created.** The attempt to purchase or the attempt to subscribe equally would have been absolutely void. Therefore, on the 31st of July, 1919, Morris Brothers, Inc., the old corporation, fraudu-

lently obtained Smith's money, and thereby became charged as trustee ex maleficio with that sum. That situation could not be changed, unless by Smith's waiving his rights, or doing something which would estop him or act as a satisfaction of his claim. No delivery of stock which was different from that represented would have waived Smith's rights, unless with full knowledge of the facts on his part. Nor if Smith furnished his money for the purchase of one kind of stock, or the stock of one particular company, would the substitution of stock in another company without his knowledge make him a stockholder. When Morris Brothers, Inc., received Smith's money it was the old corporation. It was in that corporation, even misrepresented as it was, that Smith supposed he was buying stock. That corporation was dissolved afterward, and it became absolutely impossible that preferred stock of that corporation ever could be delivered. When a stock certificate was finally delivered to Smith, he had no knowledge as to any of the facts misrepresented, and also did not know that it was stock in a different corporation entirely which was represented by the certificate delivered to him.

> "There is no agreement where one party enters into the contract under a mistake as to the identity of the other party, as where the party contracted with has falsely represented himself to be another, or has accepted an offer meant for another."

13 C. J. 378 (paragraph 266), and numerous cases there cited, among which are:

Consumers Ice Co. v. Webster, 32 App. Div. 592; 53 N. Y. S. 56;

Boston Ice Co. v. Potter, 123 Mass. 28; 25 Am. R. 9;

Fitzpatrick Building Co. v. Healy, 120 Minn. 237; 139 N. W. 495;

Boulton v. Jones, 2 H. & N. 564; 157 Reprint 232.

For the foregoing reasons the delivery of the bogus stock certificate to Smith did not make him a stockholder, whatever might have been the case if actual authorized stock in the original Morris Brothers, Inc., had been delivered to him, or if he had knowingly accepted stock in the second corporation. Accordingly, there is no prayer for rescission in our petition, but we do offer the worthless paper to be cancelled and we do offer to return the pretended dividends paid us, but this is merely an offer to do equity under the particular circumstances set forth in our claim. The fact of such offer seems, by the opinion rendered, to have been overlooked by the Honorable District Court, who says such offer was not made. The offer appears in the petition (Par. 18, Transcript of Record, page 17) and in the evidence (Transcript, pages 89-90). If rescission were involved, however, it could be granted without a specific prayer.

Error in Denying Participation in Creditors' Dividends.

We have discussed the merits of appellant's claim to be entitled to the position of a creditor in order to show that appellant is justly entitled to stand as holder of an allowed claim on an equal footing with other general creditors. The Honorable District Court allowed our claim but erroneously, we say, ordered that no dividends should be paid upon this claim until all general creditors, except those having claims of the same nature, should be paid in full. The Court thus created a classification of claims not recognized or countenanced by the Bankruptcy Act, thus holding that we are creditors who are not entitled to any payments.

The Bankruptcy Act, in Section 66, provides for the priority of certain classes of expenses and claims with their order of payment. Section 67 (a) of the Act reads as follows: "Dividends of an equal per centum shall be declared and paid on all allowed claims except such as have priority or are secured."

Here we have a direct and unequivocal provision which requires that all persons who have claims allowed, unless they are among those entitled to priority, shall be treated equally and there is no provision in the Act positive or permissive contemplating any discrimination among general claimants. On the contrary, such discrimination is also forbidden by Section 67 (e), which reads as follows: "A claimant shall not be entitled to collect from a bankrupt estate any greater amount than shall accrue pursuant to the provisions in this Act." If all other gen-

eral creditors were paid in full in preference to Smith, then every one of them would receive more than would accrue to him pursuant to the provisions of the Act. So we have both a positive and a negative provision designed to protect an allowed claim from discrimination.

The Bankruptcy Act establishes an arbitrary system upon reasons of policy. It discharges the bankrupt debtor from his just obligations and it distributes his estate according to a fixed plan and order of distribution and it leaves no room for a court, either of legal or equitable jurisdiction, to make new classifications of creditors or to dispense with or relieve against the positive provisions of the statute. We maintain, therefore, first, that the allowance of appellant's claim, not appealed from by the trustee, was well justified by the law and the evidence; second, that portion of the decree allowing the claim which provides that it should not receive dividends until after the payment of other general creditors in full is erroneous and should be modified in that respect.

Fraud As a Basis for Constructive Trust.

Having shown that appellant Smith is entitled to be considered at least as favorably in regard to payment of his claim as any other general creditor, we will now discuss the grounds upon which he is entitled to have his claim paid out of the particular funds into which his money can be traced before any part of that specific fund is applied to the payment of other claims.

The effect of fraud in creating a constructive trust, or trust ex maleficio, is clearly stated in Perry on Trusts, (6th Ed.), Par. 166:

> "There is another large class of trusts which arise from frauds committed by one party upon another. Thus, if one party procures the legal title to property from another by fraud or misrepresentation or concealment, or if a party makes use of some influential or confidential relation which he holds toward the owner of the legal title, to obtain such title from him upon more advantageous terms than he could otherwise have obtained it, equity will convert such party thus obtaining property into a trustee. If a person obtains the legal title to property by such arts or acts or circumstances of circumvention, imposition, or fraud, or if he obtains it by virtue of a confidential relation and influence under such circumstances that he ought not, according to the rules of equity and good conscience as administered in chancery, to hold and enjoy the beneficial interest of the property, courts of equity in order to administer complete justice between the parties, will raise a trust by construction out of such circumstances and relations; and this trust they will fasten upon the conscience of the offending party and will convert him into a trustee of the legal title, and order him to hold it or to execute the trust in such manner as to protect the rights of the defrauded party and promote the safety and inter-

ests of society. Such trusts are called constructive trusts. . . . In all such cases the relief is really founded on fraud and not on constructive trust. When it is said that the person who fraudulently receives or possesses himself of trust property, or who has defrauded another of his estate by misrepresentation, concealment or other fraudulent practices, is converted by the Court into a trustee and ordered to account for or to reconvey the property, the expression is used for the purpose of describing the nature and extent of the remedy against him, and it denotes that the parties defrauded or beneficially entitled have the same rights and remedies against him as they would be entitled to against an express trustee who had fraudulently committed a breach of the trust."

Pomeroy in stating the same doctrine (Eq. Juris 4th Ed., Par. 1044) says:

"Courts of equity, by thus extending the fundamental principle of trusts—that is, the principle of a division between the legal estate in one and the equitable estate in another—to all cases of actual or constructive fraud and breaches of good faith, are enabled to wield a remedial power of tremendous efficacy in protecting the rights of property; they can follow the real owner's specific property, and preserve his real ownership, although he has lost or even never had the legal title, and can thus give remedies far more

complete than the compensatory damages obtainable in courts of law. The principle is one of universal application; it extends alike to real and personal property, to things in action, and funds of money."

In Par. 1047 of the same work it is said:

"By the well settled doctrines of equity, a constructive trust arises whenever one party has obtained money which does not equitably belong to him, and which he cannot in good conscience retain or withhold from another who is beneficially entitled to it; as, for example, when money has been paid by accident, mistake of fact, or fraud, or has been acquired through a breach of trust, or violation of fiduciary duty, and the like."

See also same author, Par. 1053.

This doctrine is so universal in courts of equity that there is no occasion to multiply authorities. By the Oregon Supreme Court it is clearly stated and explained in the cases of

Parrish v. Parrish, 33 Or. 486, 490, et seq.;
Springer v. Young, 14 Or. 280, 283;
Clough v. Dawson, 69 Or. 52.

By the U. S. Supreme Court it is recognized in many cases, among which are:

Moore v. Crawford, 130 U. S. 122; 9 Sup. Ct. R. 447;
Wheeler v. Sage, 1 Wall. 518;
Angle v. Chicago R. Co., 151 U. S. 1; 14 Sup. Ct. R. 240;
Felix v. Patrick, 145 U. S. 317.

Within this doctrine, when Morris Brothers obtained claimant Smith's money by fraud and misrepresentation, they became charged with responsibility for the same as a trust fund, and the creditors of Morris Brothers are not entitled to have the benefit of Smith's money or the money of others obtained under the same circumstances, for the reason that it is not property which in equity and good conscience belongs to Morris Brothers, and which could be used by them for the payment of their own debts.

See also the interesting case arising out of the Ponzi frauds, Lowell v. Brown, 280 Fed. 193.

And then we come to the consideration of the extent to which it is necessary that the claimant identify or trace the trust property. We claim we have met this test, and that the District Court erred in holding otherwise.

Claimant Has Identified the Property Which Now Represents What Was Fraudulently Obtained From Him.

The power which the court has of restoring trust property to its rightful owner depends upon it being possible to identify the property. It is not, however, necessary that the property shall have remained in the same hands, as it can be followed so long as it can be traced, unless it come into the hands of an innocent purchaser for value. Cestui que trust is entitled to the property, even though its form be changed, and he may claim it in the form of proceeds of sale or exchange, and the only requisite is that he

can show what property now represents the trust property. In identifying the trust property it is not necessary that the objects which constitute the property be identical; for instance, it makes no difference whether money is received in coin, check, or the equivalent, nor does it matter that the money passes into a credit with the banker, title to the money itself being lost. A check drawn upon such bank and issued for the purchase of real or personal property would be a conversion of the trust fund into such property, and the trust would then attach to the newly acquired property. It is therefore not necessary that the funds be traced with literalness, but it must be shown that the trust property now exists in its original or a substituted form, and that it constitutes the whole or a part of some particular property or fund within the jurisdiction of the Court. In the present instance, it was shown beyond doubt that Smith's money was obtained by fraud, and that the purpose for which it was received and to which it was to be devoted, together with the other moneys received in like manner, was shown and preserved on the books of account of the corporation in a ledger account, to the credit of "Morris Brothers Preferred 6's"; that the formality of subscription of preferred stock by Stella M. Etheridge was performed, and that from Stella M. Etheridge was received the surrender of the necessary stock for delivery to plaintiff and the others, and in ostensible payment therefor Stella M. Etheridge received from Morris Brothers bonds representing the full amount of the stock

so surrendered for delivery to plaintiff and other persons defrauded in like manner; that these bonds were afterward surrendered to the trustee. In short, Morris Brothers received our money for preferred stock, and turned over an equivalent amount of bonds to Mrs. Etheridge in the acquisition of such preferred stock, and, it appearing that the stock was fraudulent and fictitious, claimant is entitled to the fruits of the transaction found in the hands of Mrs. Etheridge, and surrendered to the trustee. Had Mrs. Etheridge been paid in cash and immediately spent the cash in buying these bonds, the result would have been the same, for the cash paid her by Morris Brothers would have represented our money, and this, notwithstanding any fluctuations in Morris Brothers' cash on hand, or any confusion or depletion of funds of Morris Brothers which might have occurred.

It does not affect our rights that the payment was made to Mrs. Etheridge by giving her a credit which she immediately used in the purchase of these bonds. In the case of Schwartz v. Gerhardt, 44 Or. 425, a constructive trust was declared and enforced in reference to a piece of property which was purchased with trust funds, and there was no attempt to show in what form the funds had been received, nor what changes had taken place therein, but it was shown to the satisfaction of the Court that the trustee was not in a financial condition to have made the purchase of property except by the use of the funds wrongfully converted.

The Court says:

> "The principle is, the fund in trust does not lose its identity, although it may change in semblance, and whatsoever form it may have assumed the trust attaches still, whether it remains in the hands of the original trustee or has gone into other hands, especially if the latter has taken with notice of the trust relations."

It has further been held by the Supreme Court of Oregon that where the trust fund is traced into a larger mass, of which it forms a part, then the rightful owner may be protected by charging a lien upon the property which includes the trust property. The Court says:

> "But whether such owner seeks to recover such specific property, or to create a lien upon a mass or fund, he must trace such property and show that it belongs to him, or that it has gone into and then remains in the mass which he seeks to impress with a lien or charge. In such case, the question to be determined always is, whether the trust property or fund, or the proceeds thereof, is traceable into any specific property or fund. Before, therefore, one claiming to be a trust creditor can be entitled to a lien or preference over other creditors, he must make it appear that the fund or property of the debtor which he seeks to affect with such lien or preference includes the trust property, or the proceeds thereof. 'If it appears,' said Andrews, J.,

'that trust property has been wrongfully converted by the trustee, and constitutes, although in changed form, a part of the assets, it would seem to be equitable and in accordance with the equitable principles, that the things into which the trust property has been changed should, if required, be set apart for the trust, or, if separation is impossible, that priority of lien should be adjudged in favor of the trust estate for the value of the trust property or funds, or proceeds of the trust property, entering into and constituting a part of the assets: Cavin v. Gleason, 105 N. Y. 262, 11 N. E. 504.'"

Ferchen v. Arndt, 26 Or. 121, 128.

In the case at bar we have such an instance. The bonds which were appropriated by Morris Brothers to the purpose of paying Mrs. Etheridge for the preferred stock to be delivered to us, and which are now identified in the hands of the trustee, aggregate one hundred thousand dollars ($100,000.00) par value; whereas, certain of the defrauded preferred stock purchasers were repaid prior to bankruptcy adjudication, so that there now remain outstanding claims of this character for $64,500.00. It is, therefore, a case in which the claimant, with others showing themselves in like situation, should be awarded a lien upon these bonds, or their proceeds; that the bonds should be ordered sold by the trustee, and all of the proceeds remaining after the satisfaction of preferred stock fraud claimants would be available for dividends to general creditors.

In further confirmation of the propriety and sufficiency of our evidence tracing and identifying the trust property, we quote from Perry on Trusts, Par. 828:

> "A trustee need not have bought the property with the very dollars received by him in trust; if he uses or loses the trust dollars and substitutes others the latter become impressed with the trust. And the better opinion on authority now is that, even as to creditors, the mixing of trust funds with private in a general deposit does not obliterate the trust."

And from the same author, Par. 841, we quote:

> "There may be some difficulty, as a matter of fact, in tracing the trust property into a purchase made by trustee. Thus if a trustee having money in his hands, misappropriate the funds and afterwards purchase lands in his own name, it may be difficult to show that the land was purchased with the trust money; and if the trust money, or its proceeds cannot be traced into the lands, the cestui que trust cannot have a lien on them. But, if the money can be traced through all its other forms the law is plain; and the cestui que trust can claim the land. Parol evidence is admissible to show all the transactions made with the trust money. Thus the fact that the purchase money nearly corresponds with the trust fund to be invested, is important. So, if by a check or other means it can be shown

that the trust money was drawn to pay the purchase money, there can be no doubt. If a trustee makes a sale of one estate and purchases another at the same time, or shortly afterward, it will be presumed to be one transaction, although the purchase money of the estate purchased was larger than of the estate sold, and the cestui que trust will have a lien on the estate for the amount of the trust fund paid toward the purchase. So, if a trustee is under obligation to lay out a sum of money in land, and he purchases an estate at a price corresponding with the sum to be invested, the Court will presume that the purchase was made with trust money."

And from the same author, at Par. 844, we quote:

"If a trustee whose duty is to hold certain shares of stock until demanded sells the shares in violation of the trust, the cestui can in equity hold other shares of the same company belonging to the trustee to replace the trust stock, and this even when the trustee's estate is insolvent."

See also Duel v. Hollins, 36 Sup. Ct. 615, a bankruptcy case. And the author cites Draper v. Stone, 71 Me. 177, where the subject is discussed at some length, and In re Brown, 171 Fed. 254, where it is held to the same effect, the ground being that it is presumed that other stock of the same kind is held or acquired as a replacement of the trust stock, the Court cites the analogous case of an agent who depletes a bank account in his name, as agent, and

says:

> "Subsequent deposits in that fund would go to make good the former conversion, and the general creditors could not complain. Baker v. Bank, 100 N. Y. 31; 2 N. E. 453; 53 Am. Rep. 150. He may make good his default out of his own property, and all that is necessary is an unequivocal appropriation of the property to that effect."

To the same effect:

In re McIntire, 181 Fed. 960;
In re Smith, 278 Fed. 844;
Eby v. Waltz, 286 Fed. 924.

Again, it is held in Houghton v. Davenport, 74 Me. 590, that if a trustee mingles trust money with his own and afterwards separates a proper portion from the common fund as the property of the cestui que trust, and with such portion then purchases real estate in his own name, the trust is impressed upon such money and upon the land so purchased.

To return to the case at bar,—if at any time after receiving our money Morris Brothers confused it with other funds, or even expended it, nevertheless, the money being received on account of the preferred stock and equivalent property being afterward used ostensibly in the acquisition of its preferred stock, our trust funds are again segregated and identified. The case would be the same if A received money from B for investment, deposited it to his personal account with other funds, giving credit on his books to B and should thereafter purchase a certain bond

and charge the purchase on his books to B's account. It would make no difference that he used his own money in the purchase of the bond, nor that it was drawn from the confused account or from some other source. We believe that the trust fund is traced and identified here just as absolutely.

In the Court below counsel for the trustee seemed to assume that our claim that these specific assets were impressed with the responsibility to answer first, the demands of our trust was based merely on the fact that the bankrupt got the benefit of our money, and the counsel made the point that the corporation had changed its identity, and that the particular money obtained from us may never have gone into the hands of the new corporation. This is quite aside from the question. The Court remembers how this account was carried on the books of Morris Brothers, Inc., and how the new corporation, having the same officers as the old, continued the same books and made the entry turning over to Mrs. Etheridge the accumulated credit derived from preferred stock sales. The new corporation was charged with exactly the same responsibility as the old. It took the benefits, aided in the transaction and was a direct participant in the fraud.

> "If the stockholders of a corporation organize another corporation and transfer all the assets of the former to the latter, without paying the debts of the former, the transfer, irrespective of the actual intent of the parties, constitutes a fraud upon the creditors of the old cor-

poration and the new corporation is liable in equity for the debts of the old to the extent of the assets received by it; or the assets themselves may be followed by the creditors of the old corporation, so long as they have not passed into the hands of bona fide purchasers for value. This applies with peculiar force where the members of the old corporation and the new are the same persons, or mostly so."

2 Clark & Marshall on Corporations, page 995 (in Sec. 3421).

To the same effect is Corsicana National Bank v. Johnson, 251 U. S. 68, 40 Sup. Ct. 82. The consequence is, that when the officers of the new corporation, being the same individuals who had got claimant's money by fraud, appropriated certain property for use in ostensibly making good the trust, it resulted to claimant's advantage in exactly the same way as if there had been no break in the continuity of corporate existence.

The Honorable District Court took a view favorable to us upon the matter of responsibility of the new corporation, but, as above stated, held that the state of facts and the transaction as set forth, did not constitute an idenification of trust fund which would entitle us to priority for our claim. The Court so held (Transcript of Record, page 45) that upon the ground that for claimant to prevail on this phase of his case, it was necessary that the bonds turned over to Mrs. Etheridge for the acquisition of

this preferred stock should be the same bonds or money parted with by claimant Smith. We do not contend that they were the same bonds, but we submit that the Court has laid down too strict a rule for the following or identification of trust property and that the portion of the decree denying the claimant and others in like situation priority as to said bonds and their proceeds is erroneous and that the decree should be so modified as to give claimant the relief prayed for.

Respectfully submitted,

I. N. SMITH,
L. A. McNARY,
JOHN W. REYNOLDS,
Attorneys for Appellant.

Service by three copies accepted this ..... day of August, 1923.

Attorneys for the Respondent.

No. 4043

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

In the Matter of MORRIS BROTHERS, INC.,
Bankrupt

ALBERT C. SMITH,
Appellant,

vs.

EARL C. BRONAUGH, Trustee in Bankruptcy of the Estate of MORRIS BROTHERS, INC., Bankrupt,
Appellee.

Appellee's Brief

Upon Appeal from the United States District Court for the District of Oregon.

I. N. SMITH, L. A. MCNARY and JOHN W. REYNOLDS,
Attorneys for Appellant.

J. P. WINTER,
Attorney for Appellee.

JOLLY-RATELLE. PRINTERS

SEP 1 4 1923
F. D. MONCKTON

LIST OF CASES CITED

Page

In re See, 209 Fed. 175 ..... 13, 14, 15

Spokane County vs. First National Bank, 16 C. C. A. 81, 68 Fed. 979 15

Schuyler vs. Littlefield, 232 U. S. 707, 58 Law Ed. 807 ..... 15, 16, 17

Falco vs. Kaupisch Creamery Co., 42 Ore. 442 19

Sargent vs. American Bank & Trust Co., 80 Ore. 16-27 19

Jackson vs. Chew, 12 Wheaton 153 19

Morgan vs. Ruble, 81 Ore. 641 20

Lantry vs. Wallace, 97 Fed. 865, 45 Law Ed. 1218 ..... 20, 23

Newton Natl. Bank vs. Newbegin, 74 Fed. Rep. 135 21

Fletcher on Corporations, Vol. V, Sec. 3467 22

Thompson on Corporations, Vol. IV, Sec. 3545 ... 22

Smoot vs. Perkins, Tex. Civil Court of Appeals, 195 S. W. 988, 40 Am. B. R. 193 24

McWhirter vs. First National Bank, 182 S. W. 692 25

Davis vs. Burns, 175 S. W. 470 25

Scoville vs. Thayer, 105 U. S. 143-147, 27 Law Ed. 971, 972 26

Upton vs. Tribilcock, 91 U. S. 45, 23 L. Ed. 203 .. 27

Parker vs. Thomas, 19 Ind. 213, 81 Am. Dec. 385 .. 27

Campbell vs. Coin Machine Co., 96 Ore. 119 30

Randall Printing Co. vs. Sanitas Mineral Water Co., 120 Minn. 268, 43 L. R. A. (N. S.) 706 .. 32

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

ALBERT C. SMITH,
Appellant,

VS.

EARL C. BRONAUGH, as Trustee in Bankruptcy of the Estate of MORRIS BROTHERS, INC., Bankrupt,
Appellee.

Brief of Appellee

Upon Appeal from the United States District Court for the District of Oregon.

STATEMENT

On the first of August, 1919, there was issued to Appellant by Morris Brothers, Incorporated, an interim certificate providing for the delivery of $2000.00, par value, of the preferred stock of Morris Brothers, Inc., or, in case of failure to deliver the preferred stock,

Morris Brothers, Inc., would pay to Appellant $2000.00 with interest thereon from August 1, 1919. The interim certificate so issued was as follows:

"MORRIS BROTHERS, INC.

INTERIM CERTIFICATE
No. 838

Portland, Oregon, August 1, 1919.

Upon the surrender of this certificate, properly endorsed, we will deliver to Mr. Albert C. Smith or order $2,000.00—Two Thousand and no/100 Dollars—6% Morris Brothers, Inc., Preferred Stock Bonds, due.....optional.....19..., with.....and subsequent coupons attached, if when and as said bonds are issued and delivered to us.

In the event said bonds shall not be issued and delivered to us, we will redeem this certificate for Two Thousand and no/100 Dollars ($2,000.00), and the interest which would have accrued on the bond since August 1st, 1919, but such interest will cease thirty days after we transmit notice to the above named holder that the bonds will not be issued.

(Seal) By JOHN L. ETHERIDGE,
Treasurer."

At the time the interim certificate was issued, Appellant paid therefor by delivering to Morris Brothers, Inc., certain bonds which had matured. Morris Brothers collected the bonds, retained $2000.00 of the amount collected, and remitted the balance to Appellant.

When this interim certificate was issued to Appellant, Morris Brothers, Inc., was an Oregon corporation

with an authorized capital of $100,000.00 common stock only. It had no power to issue preferred stock. Thereafter, and about September 6, 1919, a new corporation was formed with a million dollar capital, consisting of $500,000.00 common stock and $500,000.00 preferred stock. Mrs. Stella M. Etheridge subscribed for all of the preferred stock and all of the common stock excepting a few shares. The old corporation transferred to this new corporation all of its assets and business in full payment of all the stock subscribed by Mrs. Etheridge, and thereupon the preferred and common stock was issued to Mrs. Etheridge. A portion of this stock which was issued to Mrs. Etheridge was surrendered by her to the corporation.

On July 13, 1920, a certificate of preferred stock of the new corporation which had been surrendered by Mrs. Etheridge was delivered to Appellant and his interim certificate was surrendered to the corporation. Dividends were paid on this preferred stock to Appellant from time to time until Morris Brothers was adjudicated bankrupt.

Although a going concern, Morris Brothers, Inc., was insolvent at the time Smith acquired the interim certificate, was insolvent at the time the preferred stock was delivered to Appellant, and continued insolvent thereafter until on December 27, 1920, it was adjudicated a bankrupt.

At the time of the adjudication Morris Brothers had assets of about $1,200,000.00 with liabilities aggregating over $2,000,000.00. Nearly all of these liabilities were contracted by the new corporation subsequent to the time Appellant paid his money to the old corporation.

The new corporation held itself out to the public as having a million dollar paid-up capital stock, and in dealing with the public collected nearly $2,000,000.00, for which the corporation issued interim certificates providing for the delivery of bonds. The record shows that the assets of the corporation will pay the general unsecured creditors thereof about fifty cents on the dollar.

The $2000.00 which Appellant paid for his interim certificate was used by Morris Brothers in its business and commingled with its other money.

Appellant makes no attempt to trace this $2000.00 either in its original or substituted form into the hands of the Trustee. The money was disbursed, likely dissipated, by the corporation in the transaction of business long before its was adjudicated a bankrupt.

ARGUMENT

Appellant contends, and for the purpose of this argument it will be assumed, that he was induced by misrepresentations to accept the interim certificate and pay for the same, or, in other words, that at the time Appellant contracted to buy the preferred stock he was deceived by misrepresentations made by the agent. Appellant makes two contentions:

1st—That the attempted sale of the preferred stock to him was void, and therefore he has a claim against the Trustee for the amount of money paid for the preferred stock on the theory of money had and received without any consideration;

2nd—That his claim is preferred to those of general creditors, and that he is entitled to a lien on certain bonds of the bankrupt to secure the repayment of this money.

Neither contention can be maintained.

For convenience, we will first consider Appellant's claim as an alleged preferred creditor. We submit that under the law there is no foundation for this claim whatever.

Appellant bases his claim as a preferred creditor upon the following allegations in the petition:

That the sums received by Morris Brothers corporation for preferred stock were carried in a distinct account upon the books of the company, both during the existence of the old corporation and the new corporation. That when the new corporation was organized and the preferred stock thereof was issued to Stella M. Etheridge, Stella M. Etheridge surrendered a part of her preferred stock which thereafter was issued to Appellant and other purchasers of preferred stock. That at the time this stock was surrendered, Stella M. Etheridge was given credit on the books of the corporation for the amount which had been received by the corporation for preferred stock sold, and thereafter that the corporation transferred to Stella M. Etheridge certain bonds of the par value of approximately $100,000.00, and to offset the credit given to her for the preferred stock surrendered charged her with these bonds.

The ledger and other books of account of the corporation were offered in evidence for the purpose of showing that the money which was received for preferred stock sold was kept in a distinct account, and for the purpose of showing that Stella M. Etheridge received credit for the par value of the preferred stock surrendered by her to the corporation, and for the purpose of showing that the corporation transferred to her bonds of the par value of over $100,000.00 in payment

for what the corporation owed her according to the books for the preferred stock surrendered by her to the corporation.

Immediately prior to the adjudication of bankruptcy, the bonds which had been delivered to Mrs. Etheridge were surrendered by Mr. Etheridge to Fred S. Morris as the property of the corporation. At that time Fred S. Morris was in charge of the affairs of the corporation.

The condition of the books of Morris Brothers was shown by Mr. Bosworth, an expert accountant in the employ of Whitcomb, Whitfield & Company, who made an audit of the books of Morris Brothers at the time of the adjudication. On cross-examination Mr. Bosworth testified as follows:

> "Q. Have you personally checked or examined all of the books and the different entries pertaining to the preferred stock that was issued by Morris Brothers?
>
> A. I have.
>
> Q. Will you state to the court the amount of preferred stock now outstanding.
>
> A. My recollection is outside of the amount to be owned by Stella M. Etheridge, $64,500 par value.
>
> Q. Can you refer to your books and give the court when that stock was paid for?
>
> A. The sale of preferred stock is evidenced by interim started November 1, 1918.
>
> Q. When was Mr. Smith's preferred stock paid for?
>
> A. He bought an interim for preferred stock July 31, 1919.

Q. Can you tell what he paid for it?

A. $2000.

Q. To whom was this paid?

A. The entry shows it was taken into the account of Morris Brothers.

Q. Do you know whether this money was used by Morris Brothers in the *general course of business?*

A. *It undoubtedly was.*

Q. From the examination of the books you have made?

Mr. Smith: We object to the question in the form in which it is put. We would have no objection to the witness attempting to show how the cash account treated it.

Mr. Winter: This is an expert witness.

Objection overruled.

A. The amount received from Mr. Smith went into the general funds of the corporation, and *used by them in their general operations.*

Q. What do you mean by general operations?

A. I mean *not segregated into a fund by itself* but went into the common fund and was probably deposited in the United States National Bank and used by them for buying bonds, stocks, paying wages, rent, etc. In other words it did not go into a trust fund, if that is what you are trying to get at.

Q. Will you turn to the entry of Mrs. Etheridge where she was given credit of $102,200 in the ledger; what is the date of that entry?

A. The heading of the account shows '1920' and the column that carries the day of the month shows '12.' There is no entry showing the month.

Other evidence though, from the journal, will show it was January 12th.

Q. January 12, 1920?

A. Yes.

Q. You may state whether this entry is true or fictitious?

A. It is apparently a fictitious entry.

Q. In what respect?

MR. REYNOLD: We object to that.

MR. WINTER: We have a right to ask him about his report.

MR. REYNOLDS: We object to the question and the answer and move it be stricken out for the reason it does not appear in what way the answer can apply, whether the fact is not true or whether the entry is a forgery.

MR. WINTER: Fictitious, not a forgery.

THE REFEREE: If it is fictitious it is not a true entry, and you will have to inquire into that.

Q. Why do you state it is fictitious instead of being a true entry?

A. My reason may be for several reasons. In the first place my examination of the books does not show that anything was ever paid for the preferred stock by her. I find no record of any payment by her.

Q. Have you examined the records of Morris Brothers carefully to find out whether Mrs. Etheridge ever paid anything for this preferred stock?

A. I did in all places.

Q. And you discovered no such entry?

A. I discovered no such entry.

Q. At the time this preferred stock was issued to Stella M. Etheridge you may state whether or not Morris Brothers at that time was solvent or insolvent?

A. That is you want my expert opinion?

Q. Yes.

A. They were insolvent.

Q. They were insolvent at the time?

A. Yes.

Q. You may state if you can from your examination of the books whether or not you were able to ascertain whether Morris Brothers were insolvent on July 31st when Mr. Smith bought his preferred stock?

A. I would say they were insolvent at that time.

Q. You think they were?

A. I think they were.

Q. Did the corporation ever receive payment for the preferred stock issued to Mr. Smith except what was received from Mr. Smith?

A. Not that I ever found.

Q. If it had received payment would not you have discovered that fact in your examination of the books?

A. I would.

Q. What compensation, if any, did Morris Brothers receive for the check for $100,000.00 which was drawn on the U. S. National Bank and which was afterwards sent down to the bank at Forest Grove?

A. Nothing.

Q. From where was this $100,000.00 taken?

A. From the United States National Bank.

Q. Was that a deposit?

A. That was a portion of their deposit with the United States National Bank and withdrawn from that deposit.

Q. What compensation, if any, did Morris Brothers ever receive for any bonds that they apparently sold to Mrs. Etheridge?

A. None.

Q. No consideration was ever paid by Mrs. Etheridge for these bonds?

A. No true consideration. No consideration in the form of a valid payment. *Nothing but a book entry.*

Q. Then as to the books of Morris Brothers showing that Mrs. Etheridge purchased $100,000.00 worth of bonds, that is not true?

A. *The books show they were paid for but the entry is fictitious.*

Q. The fact is they were not paid for?

A. Yes, not by her.

Q. Were they paid for by anybody except by Morris Brothers when they bought them?

A. That is all.

Q. These bonds, according to the books that were sold to Mrs. Etheridge were the property of Morris Brothers?

A. Yes.

Q. And had been all paid for by Morris Brothers in the ordinary course of business?

A. Yes, that is right.

Q. And afterwards when they were turned over to Mrs. Etheridge Morris Brothers received nothing for them?

A. That is right."

(See Transcript, page 80.)

Mr. Bosworth's testimony clearly shows that the money received from Appellant for the preferred stock went into the general funds of the corporation and was dissipated by the corporation. It was not segregated or kept in a fund by itself.

The testimony further shows that Mrs. Etheridge never paid for the preferred stock that was issued to her; that when she surrendered it to the corporation she was not entitled to any credit, and when the bonds were delivered to her she did not pay any value for the same. Clearly, if Mr. Etheridge had not surrendered these bonds to the corporation the Trustee under the law could have recovered the bonds for the benefit of the general creditors of the corporation.

Under the facts as disclosed by this record, the Appellant would not be entitled to a preference even if he had proved that he paid his money to the corporation as trustee and thereafter the corporation had misappropriated the same. Even then to entitle the Appellant to a preferred claim it would have been incumbent upon him to trace the property either in its "original or substituted form" into the hands of the trustee. Upon this point the law is now well settled. Judge Rogers, in his opinion, given in *In Re See,* 209 Fed. 175, relating to the following of misappropriated property, quotes Professor Ames of Harvard University, and the subject seems to be so comprehensively covered by Pro-

fessor Ames that I am quoting the following from the decision of Judge Rogers, given in the "See" case:

> "In an article on Following Missappropriated Property, which appeared in 19 Harvard Law Review 511 (1906), the particular question now under consideration was discussed by the late Prof. Ames. He said:
>
> 'In a few jurisdictions the true owner is given a preference over the general creditors of the wrongdoer upon the mere proof that the latter had the benefit of the misappropriated *res,* even though it is impossible to prove that the fund for distribution among the general creditors is, at the time of the preference allowed, larger than it would have been but for the misappropriation. But the allowance of a preference under such conditions is unjust to the general creditors. If the product of the true owner's *res* is still traceable in the assets of the wrongdoer, in the form of land, chattels, a bank deposit, or the money of a bank, its surrender to the true owner is eminently just. The creditors are left just where they would be if there had been no misappropriation. *If the true owner's res was used in paying one of the creditors, the true owner may fairly claim to be subrogated to that creditor's claim,* in which case, also, the dividends of the other creditors would not be affected by the misappropriation. *The same result is reached, if, without subrogation, the true owner is allowed to prove ratably with the other creditors.* But to go further and give the true owner a preference over all the general creditors means an unfair reduction of the dividend of the other creditors. If the true owner's *res* has been squandered, the dividend of the other creditors must be less because of the right of the true owner to prove his claim. But here, too, it would be gross injustice to pay the true owner in full, and thereby diminish still further the dividend

of the general creditors. The authorities are nearly unanimous against this unjust preference.' "

In the case of *Spokane County vs. First National Bank*, 16 C. C. A. 81, 68 Fed. 979, the Circuit Court of the Ninth Circuit laid down the following principle:

> "We are unable to assent to the proposition that because a trust fund has been used by the insolvent in the course of his business, the general creditors of the estate are by that amount benefited, and that therefore equitable considerations require that the owner of the trust fund be paid out of the estate to their postponement or exclusion. If the trust fund has been dissipated in the transaction of the business before insolvency, it will be impossible to demonstrate that the estate has been thereby increased or better prepared to meet the demand of creditors, and, even if it is proven that the trust fund has been but recently disbursed, and has been used to pay debts that otherwise would be claims against the estate, there would be manifest inequity in requiring that the money so paid out should be refunded out of the assets, for in so doing the general creditors whose demands remain unpaid are in effect contributing to the payment of the creditors whose demands have been extinguished by the trust fund. Both the settled principles of equity and the weight of authority sustain the view that the plaintiff's right to establish his trust and recover his fund must depend upon his ability to prove that his property is in its *original or a substituted form* in the hands of the defendant."

In the case of *Schuyler vs. Littlefield*, 232 U. S. 707, 58 Law Ed. 807, the Court had before it the question of whether a claim for a trust fund constituted a preferred claim, the appellants contending that even if the trust fund of about $10,000 was checked out of the bank, they were able to trace the fund into stocks that

subsequently came into the hands of the trustee in bankruptcy. This contention was based on the claim that out of the proceeds of the trust fund Brown & Co. had paid notes due to the bank and thereby released collateral which ultimately came into the possession of the trustee. In answering this contention, the Supreme Court said:

> "But the record fails to show when the $266,600 was deposited, and it also fails to show with the requisite certainty the particular use made by Brown & Company of that money. The banking transactions on August 24th involved several millions of dollars. Money was deposited by Brown & Company in the bank, and money was borrowed by Brown & Company from the bank. Part of the loans were deposited to the bank account, and a part represented by cashier's check did not appear in that account. Money was paid by Brown & Company to depositors and the bank. Payments to the bank were made on account of notes, some of which represented loans appearing in the deposit account, and others represented loans which had not been so entered. Some of the loans were secured and others were unsecured. And whether the money received from Miller, which included the trust fund of $9600, was used to pay the secured or unsecured loans does not appear with certainty.
>
> * * * Like all other persons similarly situated, they (appellants) were under the burden of proving their title. If they were unable to carry the burden of identifying the fund as representing the proceeds of their Interborough stock, their claim must fail. If their evidence left the matter of identification in doubt, the doubt must be resolved in favor of the trustee, who represents all of the creditors of Brown & Company, some of whom appear to have suffered in the same way. Like

them, the appellants must be remitted to the general fund."

Upon the point that the Appellant is not entitled to a preferred claim, we respectfully submit that the opinion of the trial court is unanswerable.

"The settled rule in this jurisdiction seems to be that claimant's right to establish his trust and recover his fund depends upon his ability to prove his property in its original or substituted form in the hands of the alleged trustee. *Spokane County vs. First National Bank of Spokane,* 68 Fed. 979, 982. This petitioner has been unable to do. All he can say is that the proceeds of his bonds have gone into the general business of Morris Bros., Inc. They have since probably been several times turned over. They have wholly and entirely lost their identity, either in the original or substituted character, and the claim is therefore not one that can be or ought to be preferred above those of the general creditors. To a like purpose, see *Schuyler vs. Littlefield,* Trustee of Brown & Co., 232 U. S. 707, and *In re See,* 209 Fed. 172.

It is strenuously insisted, however, that the bonds that found their way into the hands of Stella M. Etheridge in exchange for certain of the preferred stock of Morris Bros., Inc., and which were eventually found in Tacoma and returned to the company, constitute a segregated fund set apart and kept separate from the general property or assets of the company, and that therefore petitioner is entitled to a lien upon this fund. This contention overlooks entirely the principle upon which such a lien is predicated. These bonds that came into the hands of Stella M. Etheridge are by no means the same bonds, money or funds with which petitioner parted when he purchased the preferred stock. They were supposedly other bonds that

> Morris Bros. purchased or accumulated after petitioner parted with his Canadian bonds or money arising from the collection thereof, and were not that which constituted the consideration for the preferred stock that he acquired. It is not shown that the petitioner ever owned or acquired any interest in the bonds that were sold or set apart to Stella M. Etheridge, and I am aware of no principle applicable whereby he is entitled to a lien upon any of these particular bonds."

There is no proof in the record that the money which was paid by Appellant ever came into the hands of the Trustee either in its original or substituted form, and therefore there is no merit to the Appellant's claim to a preference.

We will next take up the point as to whether Appellant has a valid claim against the Trustee for the money paid for the preferred stock. As we view it, this question depends solely upon whether Appellant ever became a stockholder in Morris Brothers, Inc., for if Appellant became a stockholder in the bankrupt corporation, then his claim cannot be sustained against the Trustee for the obvious reason that a large amount of corporate indebtedness, over two million dollars, was created after Appellant became a stockholder.

The Appellant contends that he was induced by deceit to buy the stock, and that he never did become a stockholder of the corporation—not only that the agreement was voidable but that it was void.

We submit that the Appellant was a stockholder in the bankrupt corporation. He received the stock and owned it and held it until after the corporation was adjudicated bankrupt. He received and accepted dividends on this stock. The corporation had authority and

power to issue the stock, and if the corporation had prospered in business instead of failed, neither the corporation nor any stockholder of the corporation could have caused the cancellation of Appellant's stock or enjoined the payment of dividends to him. His subscription may have been voidable on the ground of fraud, but it was not void. Appellant is a stockholder in the bankrupt corporation.

The Trustee represents not only the corporation but the creditors of the bankrupt. In the case of *Falco vs. Kaupisch Creamery Co.,* 42 Ore. 442, the Supreme Court of this state holds that Section 70 of the Bankruptcy Act vests in the Trustee in Bankruptcy the right to recover unpaid stock subscriptions from the stockholders of an Oregon corporation.

The opinion in the Falco case is adhered to in the recent case of *Sargent vs. American Bank & Trust Co.,* 80 Ore. 16-27.

The court quotes from the Falco case with approval, as follows:

> "From this doctrine it necessarily follows that unpaid subscriptions to the capital stock of the corporation pass like other assets to the Trustee in Bankruptcy, and he is the only party that can bring an action or proceeding thereon."

Therefore in this state it is clearly the law that a Trustee represents the creditors of a bankrupt and has the power to enforce statutory liability. And in the construction of local statutes the decisions of state courts of last resorts will govern and control the federal courts.

See *Jackson vs. Chew,* 12 Wheaton 153.

In this state fraud is not a defense in an action by a

creditor of a corporation or a trustee of a bankrupt corporation to enforce stockholders' liability. In the recent case of *Morgan vs. Ruble,* 81 Ore. 641, the Supreme Court said:

> "There is but one question involved in this case and that is whether or not the fact that promoters of a corporation made false and fraudulent representations to the defendants to induce them to become stockholders can be relied upon to defeat the claim of a creditor."

The court in this case cites two decisions from Georgia and directly holds that as between a creditor and a stockholder of an insolvent corporation, fraud by the corporation in selling the stock is no defense.

For the same reason Appellant in this cause cannot base his claim upon false representations made at the time he bought the stock. The record in this cause shows that after Appellant had acquired his stock, the corporation held itself out to the public as having a million dollars of paid-up capital, and thereafter contracted large indebtedness. Claims amounting to over $1,800,000 have been filed with the Trustee. This vast indebtedness was contracted after Appellant had acquired his stock. (See Transcript, page 80.)

In the case of *Lantry vs. Wallace,* 97 Fed. 865, affirmed by the Supreme Court of the United States in 45 Law Ed. 1218, the Federal Court holds that where one was induced by fraud to purchase stock in a national bank, and continues to be a stockholder until after the bank becomes insolvent, he cannot set up the fraud as a defense in an action by the Receiver to recover the amount of an assessment on his stock "without showing *affirmatively* that there are no creditors of the bank who became such while he was a stockholder."

In *Newton Natl. Bank vs. Newbegin,* 74 Fed. Rep. 135, the Circuit Court of Appeals of the Eighth Circuit, speaking through Justice Thayer, says:

> "There are obvious reasons why a shareholder of a corporation should not be released from his subscription to purchase capital stock after the insolvency of the company, and particularly after a proceeding has been inaugurated to liquidate its affairs, unless the case is one in which the stockholder has exercised due diligence and in which no facts exist upon which corporate creditors can reasonably predicate an estoppel. When a corporation becomes bankrupt, the temptation to lay aside the garb of a stockholder on one pretense or another and to assume the role of a creditor is very strong, and all attempts of that kind should be viewed with suspicion. If a considerable period of time has elapsed since the subscription was made; if the subscriber has actively participated in the management of the affairs of the corporation; if there has been any want of diligence on the part of the stockholder either in discovering the alleged fraud or in taking steps to rescind when the fraud was discovered; *and, above all, if any considerable amount of corporate indebtedness has been created since the subscription was made which is outstanding and unpaid;* in all of these cases the right to rescind should be denied where the attempt is not made until the corporation became insolvent."

In the present case a year and a half expired from the time that Appellant purchased his stock to the time that the corporation failed, and all of the large indebtedness of the company now outstanding was created after Appellant obtained his interim certificate and even after his certificate of stock was delivered to him and the interim certificate was surrendered. Therefore, under the decision of the Court of Appeals the Appel-

lant cannot now void his subscription contract or rescind.

We therefore repeat that in this case Appellant's claim cannot rest upon misrepresentations, and that the sole question is whether the Appellant ever became a stockholder in the corporation, whether the preferred stock that was issued to him was void and a nullity.

When this cause was tried before the Referee, counsel for Appellant submitted numerous authorities to the effect that the stock subscription made by the Appellant was void because at that time Morris Brothers, Inc., had no authority or power under its articles to issue preferred stock.

But the point is not whether the agreement entered into by the Appellant to buy preferred stock is valid. The corporation afterwards did acquire the power and authority to issue preferred stock, and did issue the stock to the Appellant. It is conceded that a contract made by a corporation to sell stock which it has no authority to issue is not binding. It is conceded that where a corporation makes an over-issue of stock, that the stock so issued is not valid. But in the present case there was not an over-issue.

> "When a corporation which has already issued the full amount of its stock accepts a surrender of, or purchases the shares of one of the stockholders and afterwards re-issues the same, this does not constitute an over-issue."
>
> Fletcher on Corporations, Vol. V, Sec. 3467.

In Thompson on Corporations, Vol. IV, Sec. 3545, the author says:

> "It is clear that the re-issue by the corporation of surrendered stock to another party does not constitute an over-issue of stock."

In the case of *Lantry vs. Wallace,* 45 L. Ed. 1218, a receiver brought an action against stockholders of a bank to enforce the stockholders' liability under the statute. The defense was made by one of the stockholders that he was induced by fraud to buy the stock, and that the purchase by him on account of the fraud was not simply voidable but was absolutely void, and that he did not by buying it or taking a certificate of stock become a shareholder within the meaning of the law, for the reason that the very stock which he had acquired was stock that had been illegally surrendered to the bank for cancellation. The Supreme Court in ruling on the point said:

> "It is true that the statute declares that no national bank shall be the purchaser or holder of any of its own shares of capital stock, but will a violation of this provision by the bank relieve from liability one who holds a certificate of its stock and enjoys the right of a shareholder?"

The Court concedes that the purchase of the stock by the bank was *ultra vires* and held that the bank in purchasing its own stock made unlawful use of its funds, but by selling the stock to the defendant the capital of the corporation was restored and the Court says:

> "We are at a loss to understand how this transaction on the part of the bank can operate to relieve the defendant from his liability as a stockholder in a suit brought by the receiver to recover a stock assessment which was levied solely for the benefit of corporate creditors. The sale of the stock to the defendant after the bank had purchased the same was not unlawful, since it operated to restore that part of the capital that had been retired and to that extent repaired the wrong which might otherwise have been done to the bank creditors."

So in the case at bar, even if the stock was irregularly issued to Mrs. Etheridge, or if the corporation had no right to purchase this stock, the sale of the same to Smith was not illegal and void.

The case of *Smoot vs. Perkins*, Texas Civil Court of Appeals, 195 S. W. 988, 40 Am. B. R. 193, is one in which the Court of Appeals of Texas put at rest this contention on the part of the plaintiff. In that case one Perkins and Kell had agreed to take five shares of the capital stock of the Northwestern Auto and Supply Company. They paid $250 in cash and executed their note for $250, payable to the corporation six months after date. The agreement was made before the corporation was organized. Afterwards the corporation was adjudged a bankrupt and Smoot as trustee brought action on the note. Perkins and Kell defended on two grounds—first, because the note was void, as it was given for stock issued in violation of the constitution and laws of the state of Texas, and, second, because they had been induced to take the stock by fraudulent and false representations of the president of the corporation. The trial court held that the note was void because given in violation of law in part payment for capital stock of the corporation. The evidence in the case showed that the defendant had taken no steps to repudiate the subscription before the appointment of the trustee in bankruptcy. The Court of Appeals held that upon these facts the trial court should have entered judgment for the plaintiff. The Court said:

> "Even if the stock had been issued, the appellee could not defeat a recovery of the note upon suit by the representative of the creditors of the corporation after it became insolvent."

Citing *McWhirter vs. First National Bank*, 182 S. W. 692, in which case a writ of error was denied by the Supreme Court of the United States. The court further held that the fraud, if it existed, would not under the facts in that case be a defense because the corporation became insolvent and the suit being by a representative of the creditors. Citing *Davis vs. Burns*, 175 S. W. 470, in which a writ of error was also denied by the Supreme Court, and numerous other cases.

In the instant case when Appellant paid his money to Morris Brothers, he did not enter into an agreement to buy preferred stock, but received an interim certificate by which the company agreed to deliver to him either preferred stock or pay to him a certain amount of money. Thereafter the stock was authorized and it was issued to the Appellant, received by him, and thereafter dividends paid to him and accepted by him. Can it now be said that the Appellant never became a stockholder in the company? If the company had been successful, could the holders of other shares of stock have enjoined the corporation from paying dividends on Appellant's stock?

Counsel for Appellant has cited no authority, and we believe none exists, to the effect that the preferred stock issued to the Appellant is a nullity, or to the effect that the Appellant is not a stockholder in the company.

At the time Appellant paid his money and received the interim certificate, he was bound to know that under its charter Morris Brothers had no authority to issue preferred stock. Persons dealing with a corporation or with the managers of a corporation must take notice of the limitations imposed upon their authority by the act of incorporation. The law secured to the Appellant

the means of ascertaining the real capital of the company. Appellant was bound to know that at the time he acquired the interim certificate Morris Brothers, Inc., under the law was not authorized to issue preferred stock.

> *Scoville vs. Thayer,* 105 U. S. 143-147, 26 L. Ed. 971, 972.

In that case the Supreme Court of the United States had before it the question as to whether the holder of unauthorized stock in a corporation was entitled to have money paid thereon by him applied as a credit on the unpaid balance due on the authorized stock held by him. The Supreme Court in denying this right to a set-off said:

> "It (referring to the payment made on the unauthorized stock) was a voluntary payment for the benefit of the company and tended to increase the value of the authorized stock. In that way the stockholders got the benefit of it. *There is no rule of law or equity which entitles him in a contest between himself and a creditor of the company either to receive a credit for it on his unpaid stock, or to have it repaid to him pro rata out of the assets of the company.*"

This was an action brought by assignees in bankruptcy to collect for unpaid stock subscriptions.

Upon the argument of this cause counsel for Appellant submitted a supplemental brief in which the contention is made that the Appellant had undertaken to buy stock in the "original Morris Brothers, Inc.," and thereafter there was delivered to him stock in a new corporation; that the Appellant thought he was dealing with the old corporation, never intended to accept stock in a different corporation, and therefore he never be-

came a stockholder in the reorganized company. To sustain this proposition, the familiar rule is stated to the effect that "there is no agreement where one party enters into a contract under a mistake as to the identity of the other party, as where the party contracted with has falsely represented himself to be another, or has accepted an offer meant for another." This principle of law has no bearing upon the instant case.

In the first place, Appellant was bound to know under the law that the "original" corporation had no power to issue preferred stock. As stated by the Supreme Court in the case of *Scoville vs. Thayer, supra,* the Appellant was as much bound to know the limits of the charter of the company in which he was to become a stockholder as the public or creditors of the company. Therefore, he knew that the old corporation had no power to issue preferred stock. The law is well settled that all persons subscribing for stock in a corporation are presumed to know the provisions of its articles of incorporation and their effect, and if they are induced to subscribe by false representations of the agents of the corporation as to the powers of the corporation, or that it will do what its articles do not authorize it to do, they cannot rely upon such representations as grounds for rescinding the subscription. This is true, for instance, of false representations that a railroad company has a right to or intends to construct its road along a certain route, and similar representations where its route or termini are fixed by its charter.

> *Upton vs. Tribilcock,* 91 U. S. 45, 23 L. Ed. 203.
> *Parker vs. Thomas,* 19 Ind. 213, 81 Am. Dec. 385.

Therefore, at the time that the Appellant received his interim certificate for the preferred stock or the pay-

ment to him of a certain sum of money, he was bound to know, or conclusively presumed to know, that Morris Brothers, Inc., had no power to issue preferred stock; that they did not have $500,000 worth of common stock issued and paid.

As a matter of fact, Mr. DeLong, a witness on part of Appellant, testified on cross-examination as follows:

"Q. Now just repeat the conversation you had with Mr. Smith.

A. Well, as I said, I cannot repeat the words that I used.

Q. Repeat the substance of it then.

A. I approached him and told him that the company was reorganizing, that they were expanding and increasing their business inasmuch as they expected to have additional capital.

Q. In regard to that you had personal knowledge of the company and knew that they were increasing their business and their stock?

A. Yes.

Q. You knew that personally?

A. Yes.

Q. You knew that to be a fact?

A. Yes.

Q. What else did you tell him?

A. I told him—I went into details with this preferred stock, told him there would be so much issued, and so on.

Q. Did you tell him how much would be issued?

A. I must have told him how much would be issued.

Q. What did you tell him in regard to that?

A. As to how much would be issued?

Q. Yes.

A. It was about the time that I learned of the million dollar corporation and I think I told him about that.

Q. Did you tell him how much preferred stock was sold?

A. Well, I don't know whether I did or not.

Q. How much was sold; did you know how much had been sold at that time?

A. At that time there had been something over $80,000 worth sold, maybe more.

Q. Did you tell Mr. Smith that you had sold $80,000?

A. Now I must have told him. I would think that I did tell him.

Q. You now remember that you expected to sell about $420,000 more?

A. No, I did not.

Q. You told him they expected to sell about half a million dollars worth of preferred stock?

A. That was the issue.

Q. You said you had sold about $80,000 at that time, at the time he subscribed?

A. Yes."

(See Transcript, page 75.)

According to this testimony the Appellant was told that the company was to be reorganized, that the pre-

ferred stock was to be issued, and that he was buying a part of this preferred stock.

Counsel for Appellant cite the case of *Campbell vs. Coin Machine Co.,* 96 Ore. 119, as in point. In that case plaintiff had agreed to buy stock in a corporation with a capital stock of $4,000,000, divided into 40,000 shares of the par value of $100 each, and paid upon his subscription $375. Thereafter, without the plaintiff's consent, defendant corporation reduced its capital stock from $4,000,000 to $400,000, consisting of 40,000 shares of the par value of $10 per share. The Supreme Court in deciding the case said:

> "The plaintiff contracted to invest $500 in a corporation with a capital stock of $4,000,000, or to furnish one eight-thousandth part of the capital. The defendant proposed to the plaintiff that he shall invest $500 in a corporation with a capital stock of $400,000, or to furnish one eight-hundredth part of the capital."

The Court held the decrease in the capital stock and the amount of capitalization admitted to have been made by the defendant company without plaintiff's consent changed the corporation from a strong concern with a capital of $4,000,000, or at least one-half thereof if only half of the stock was subscribed, to a smaller and weaker one with only one-tenth as much capital, and that plaintiff therefore was not bound to take stock in the changed corporation.

In the case at bar the Appellant knew that the old Morris Brothers corporation did not have $500,000 worth of common stock, and had no power to issue any preferred stock. He was told that a reorganization was taking place, and that $500,000 worth of preferred stock

would issue. Appellant therefore knew that the old corporation could not issue this stock to him, and that he would receive it out of a corporation that was reorganized, or a new corporation.

Under the law the Appellant was conclusively presumed to know that when the preferred stock was delivered to him and accepted by him that the new corporation had been formed; he was bound to know the provisions of its articles; he was bound to know that he was receiving stock in this new organization because it was the only organization that had power to issue it. With this knowledge he received the stock and retained it and accepted dividends on it. Can he now claim that he was not a stockholder in the new corporation, that his stock certificate was a nullity and that his claim is on a par with that of the general creditors of the corporation?

We do not deem that it is necessary to consider to what extent a purchasing corporation is bound to pay the debts of a selling corporation, or whether the new corporation was a mere continuance of the old, or whether there was an implied agreement that the new corporation should assume all of the debts of the old.

Appellant is a stockholder in the bankrupt corporation, and therefore as between the Appellant and the trustee in bankruptcy who represents the creditors of the corporation, claimant cannot prevail.

It is elementary law that a stockholder of a corporation is not entitled to any of its assets until the creditors have been paid in full. The public dealt with the bankrupt and trusted the corporation, relying upon the fact

either that its capital stock had been paid for or was due from the stockholders. This the court presumes.

Randal Printing Co. vs. Sanitas Mineral Water Co., 120 Minn. 268, 43 L. R. A. (N. S.) 706.

The Appellant is a stockholder in the company, and as such his rights are inferior to those of a creditor of the company, and therefore the petition must be denied.

Respectfully submitted,

J. P. WINTER,

Attorney for Trustee.